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Supreme Court of the United States

October Term, 1974

No. 74-389

ALBEMARLE PAPER COMPANY, *et al.*,

Petitioners,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

No. 74-428

HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

Petitioner,

v.

JOSEPH P. MOODY, *et al.*,

Respondents.

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HALIFAX LOCAL NO. 425, UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO,

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Respondents.

BRIEF FOR RESPONDENTS

Questions Presented

I. Whether Albemarle's Testing Program Is Impermissible Under *Griggs* v. *Duke Power Company*—

A. Did Albemarle's tests disproportionately exclude black employees from jobs previously closed to them by overt segregation?

B. Did Albemarle fail to prove its testing program job-related?

C. Should Albemarle's unlawful testing program be enjoined?

II. Whether the Plaintiff Class Is Entitled to an Award of Back Pay—

A. Is the class back pay award within the District Court's power to provide a remedy for employment discrimination under Title VII?

B. Did the Court of Appeals state an appropriate standard for the exercise of remedial power to award back pay in keeping with the statutory purpose?

C. Are there specific factors which would warrant denial of the back pay remedy in this case?

Statement of the Case

The Parties

This case is a certified class action brought by a group of black paper mill workers who seek relief from practices of employment discrimination by their employer and union in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* (A. 46-7, 474).

The paper mill, located in Roanoke Rapids, North Carolina, is fully described in the brief of Petitioner Albemarle (Co. Br. 4-10). The Petitioners, defendants below, are various corporations which have or had an interest in ownership of the mill and the local labor union

which represents the mill's hourly paid employees (A. 476).[1] Plaintiffs Moody and others are black employees or former employees of Albemarle and members or former members of Local 425. Plaintiffs represent a class of persons determined by the district court to include all Negro employees at the mill as of June 30, 1967, and all Negro employees at the mill thereafter who might be subjected to discrimination in initial job assignment or otherwise (A. 54, 474).

Factual Background

Albemarle's mill is functionally similar to other primary pulp-and-paper facilities (A. 477). As in other Southern paper mills, prior to the effective date of the Civil Rights Act of 1964, race was the absolute determinant of employment opportunities (A. 352).[2] The district court found that

> Prior to January 1, 1964, Albemarle's lines of progression were strictly segregated on the basis of race. Those lines of progression to which black employees were traditionally assigned were lower paying than the "white" lines of progression (A. 480).

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[1] The Petitioners in No. 74-389 are referred to herein as "Albemarle" or the "Company". Petitioner in No. 74-428 is referred to as "Local 425" or the "Union." Both are sometimes referred to as "defendants". Respondents Moody et al. are sometimes referred to as "plaintiffs".

[2] The Southern pulp-and-paper industry's nearly uniform discrimination practices have engendered dozens of Title VII suits. See, for example, *Local 189, United Papermakers & Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied* 397 U.S. 919 (1970); *Long* v. *Georgia Kraft Co.*, 450 F.2d 557 (5th Cir. 1971); and *Rogers* v. *International Paper Co.*, —— F.2d ——, 9 EPD ¶9865 (8th Cir. 1975).

The lines of progression (hereinafter "LOPs") reserved for whites included all 13 "skilled" lines.[3] Blacks were restricted to the remaining 6 LOPs.[4] Whites had access to approximately 86 jobs in the white LOPs while blacks were limited to approximately 14 jobs in their inferior LOPs (A. 477).

Employees promoted to the racially segregated LOPs from racially segregated "extra boards," which are essentially labor pools (A. 217). From the whites-only General Extra Board, employees moved into the all-white "skilled" lines of progression (A. 485, 219); the black Utility Extra Board fed the black "unskilled" LOPs (*id.*). Employees forced out of LOPs due to reduction-in-force went to the respective extra boards, and there retained priority recall rights to their former LOPs, in accordance with the segregated pattern (A. 485, 104).

In addition to the segregated production classifications arranged in LOPs, Albemarle employed over 100 mechanics in a Maintenance Department (A. 488-9, 484). Until 1964 no black person ever worked in Maintenance (A. 489).

Prior to the mill modernization of the 1950's, Albemarle had no educational or testing requirements for employees (A. 487-8). In 1952-3 it introduced a high-school education requirement for new hires into "skilled" progressions

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[3] Yard Crew LOP and Knife Grinder Job in the Woodyard Department; Paper Machine and Beaterman LOPs in the A Paper Mill Department; Finishing Crew, Shipping Crew, Paper Machine, and Stockroom LOPs in the B Paper Mill Department; Digester and C.E. Recovery LOPs in the Pulp Mill Department; Boiler Operator LOP in the Boiler Room Department; and the Mill and Laboratory LOPs in the Technical Services Department (A. 89).

[4] Chipper Operator and Service Crew LOPs in the Woodyard; Brokeman and Lead Loader LOPs in the A Paper Mill; Payloader LOP in the Pulp Mill; First Fireman LOP in the Boiler Room; and the "dead-end" janitor job (A. 89).

(A. 487, 237-8). Then in 1955-6, it introduced testing requirements for such new employees (A. 486, 329, 338). Under these policies, applicants had to satisfy the educational requirement and to achieve specified passing scores on the Revised Beta Examination and the Bennett Test of Mechanical Aptitude (A. 486). Albemarle fixed the passing scores on the basis of a concurrent validation study purportedly done on the two tests by the Company's then Personnel Manager after their introduction (A. 329-331, 340, 486-7).[5] Albemarle presented undocumented testimony that this study showed a significant correlation between Beta test scores and job performance in one department, the B Paper Mill (A. 99, 486-7, 330, 340-1). The study of the Bennett test, however, evidenced a negative correlation with job performance, i.e., the higher the test score, the less likely the testee was to succeed on the job (A. 330-1).

After about five years, Albemarle discontinued use of the Bennett because of the negative results, and decided to substitute a verbal intelligence test (A. 331). Based on the Personnel Manager's general familiarity with the Wonderlic Personnel test, and without attempting to validate it, Albemarle adopted the Wonderlic late in 1963 and used it subject to the nationally recommended cut-off score (A. 100, 487, 331-2). Since 1963, the Company has required both high school education and scores of 100 on the Beta test and 18 on the Wonderlic test (either Form A or Form B) for hiring or transfer into the "skilled" LOPs and the

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[5] The individual who performed that study, Mr. Warren, did not testify. One witness who described the study, Mr. Bryan, was not at Albemarle until 1963 (Bryan deposition, plaintiffs' exhibit 32, p. 487 [not printed in Appendix]); the other witness, Mr. Boinest, admitted that he was "not a testing expert[;] I know nothing about the details of tests," and had only vague recollections of the study (A. 340-3). The validation study results were never reduced to writing; the only report of results was oral (A. 334-5).

Maintenance Department (A. 487, 99, 100, 332). Employees who worked in such positions before the introduction of these standards, however, were not required to qualify in order to retain their jobs or promote further in their LOPs (A. 488). Albemarle's application of educational and testing requirements to incumbent employees is closely similar to practices held unlawful in *Griggs* v. *Duke Power Co.*, see 401 U.S. 424, 427-8 (1971).

The Wonderlic test—the same test involved in *Griggs*—is a short intelligence test designed to measure verbal facility.[6] The Beta test is a written non-verbal examination

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[6] The test appears at A. 297-300 (Form A); A. 301-304 (Form B). The Wonderlic was developed by 1942 (A. 297, 301). Questions on the Wonderlic test include the following:

[Form A] #4 —Answer by printing YES or NO—Does RSVP mean "reply not necessary"?

#23—Two of the following proverbs have the same meaning. Which ones are they?

1. Many a good cow hath a bad calf.
2. Like father, like son.
3. A miss is as good as a mile.
4. A man is known by the company the keeps.
5. They are seeds out of the same bowl.

#28—INGENIOUS INGENUOUS—Do these words have 1 similar meanings, 2 contradictory, 3 mean neither the same nor opposite?

#47—Assume that the first two statements are true. Is the final one: 1 true, 2 false, 3 not certain: Great men are ridiculed. I am ridiculed. I am a great man.

#50—In printing an article of 30,000 words, a printer decides to use two sizes of type. Using the larger type, a page contains 1200 words. Using the smaller type, a page contains 1500 words. The article is allotted 22 pages in a magazine. How many pages must be in the smaller type?

designed to measure the intelligence of non-English speaking persons or illiterates.[7] Albemarle's employment records show that black employees achieved lower scores than whites on both the Beta and Wonderlic tests and that blacks more frequently failed the tests (Pl. Ex. 10, Pl. Ex. 73, Co. Br. 29).

In 1964-5, the Company twice offered black employees the opportunity to transfer to white LOPs; Albemarle still required the employees to pass the tests but waived the high school requirement for those found test qualified (A. 225-6). The court found that some blacks passed and transferred, but that "a majority of those who took the tests failed them" (A. 488). Those who failed remained trapped in their traditional LOPs after 1965.

[Form B] #11—Are the meanings of the following sentences: 1 similar, 2 contradictory, 3 neither similar nor contradictory?

A faithful friend is a strong defense. They never taste who always drink.

#26—Assume that the first 2 statements are true. Is the final statement: 1 true, 2 false, 3 not certain? Most business men are progressive. Most business men are Republicans. Some progressive people are Republicans.

#42—CENSOR CENSURE—Do these words have 1 similar meanings, 2 contradictory, 3 mean neither same nor opposite?

#50—Three men form a partnership and agree to divide the profits equally. X invests $5500, Y invests $3500, and Z invests $1000. If the profits are $3000, how much less does X receive than if the profits were divided in proportion to the amount invested?

[7] Because the Beta test is pictorial rather than verbal, illustrative questions cannot conveniently be reproduced here. The test appears at A. 458-71. It was developed by the U.S. Army during World War I and last revised in 1946 (A. 487, 458).

Job segregation was reinforced before and after 1965 by a "job seniority" system governing employees' rights of promotion, transfer, demotion, layoff, and recall (A. 477-8). This system, which remained in effect until 1968, recognized three types of seniority: job seniority, defined as length of continuous service in a particular job classification in an LOP (or in any higher job in the same LOP) (A. 95, 288, 215-6); department seniority, defined as length of continuous service in a particular department (A. 95, 288, 215); and plant or mill seniority, defined as length of continuous service at the Roanoke Rapids facility (*id.*). Job seniority governed employee movement; promotions went to the employee with most job seniority in the next LOP job below the vacancy (A. 288).[8] Demotion due to workforce reduction was imposed on the employee with least job seniority (*id.*). Plant seniority governed layoffs out of the labor pool (extra boards) as well as noncompetitive employee benefits, but had no bearing on job competition (A. 216). Since black employees were not in white jobs or LOPs, they could not, under this system, accumulate any seniority in the "skilled" or white jobs.[9]

Although Albemarle and Local 425 contended that they ceased overt discrimination by the effective date of Title VII, July 2, 1965, the record shows and the district court found little actual integration of jobs after 1964. As of June 30, 1967, almost every job and LOP remained totally segregated. Only 6 of some 105 job classifications had both

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[8] The seniority provisions governing production employees in LOPs were inapplicable to Maintenance positions (A. 105, 222), and a production worker had no seniority right to transfer to any Maintenance job or to retain any accumulated seniority if he did so transfer (A. 222, 295).

[9] The racially discriminatory nature of this seniority system, in the circumstances of the Southern pulp-and-paper industry, has been widely recognized by the federal courts. See cases cited in n.2, *supra*.

white and black employees; 21 had only blacks and 76 only whites (2 were not occupied) (A. 481-484). Eleven LOPs[10] remained all white; four LOPs[11] were all black; only five LOPs[12] had both white and black employees, and they were "integrated" to only a token degree. The Maintenance Department consisted of 137 whites and one black, a 6th (level) Maintenance Employee Apprentice (A. 484). The extra boards remained racially distinct with 50 blacks and no whites on the Utility Extra Board and 62 whites, 2 blacks on the General Extra Board (A. 484-5). Based on these figures, the district court found that, "[t]he racial identifiability of jobs and departments in lines of progression were maintained subsequent to the effective date of Title VII (July 2, 1965)" (A. 480).

Albemarle and Local 425 negotiated certain changes in the seniority and transfer provisions of their collective bargaining agreement in 1968 (A. 479-80, 227). These changes did not eliminate the discriminatory features of defendants' seniority system (A. 495-7, 499).[13] An unlawful

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[10] Service Crew (Woodyard), Digester Capper, Caustic Operator, and C. E. Recovery Operator (Pulp Mill), Beaterman (A Mill), Stock Room (B Mill), Shipping Crew (B Mill Product), Power Plant, Boiler Room, Technical Service-Mill, Storeroom. Compare, A. 110, A. 481-4.

[11] Chipper Operator (Woodyard), Payloader (Pulp Mill), Brokeman and Finishing Room (A Mill). *Id.*

[12] Yard Crew (Woodyard) (one black in lowest job only), Paper Machine (A Mill) (one black in next to lowest job), Paper Machine (B Mill) (one black in lowest job), Finishing Crew (B Mill Product) (two blacks), Technical Service—Lab (one black in lowest job). *Id.*

[13] The 1968 seniority changes gave employees the right to apply in writing for transfer to another LOP (Section 10.2.1, A. 479, 214, 239-40). The decision whether to allow such transfer and the choice among applicants remained within the Company's sole and uncontrolled discretion *(id.)*. When such transfer was allowed, the transferring employee immediately lost his seniority in his previous department, and could recover it only in the event his health

seniority system remained in effect until entry of the district court's decree (A. 499-507).

The Company and Union also agreed in the 1968 contract to a number of structural changes in the LOPs (A. [illegible]). The district court found this restructuring of LOPs "had the effect of eliminating, to some extent, their strictly segregated composition. However, it is to be noted that black employees were still 'locked' in the lower paying job classifications" (A. 485).[14] The continuing "lock-in" of blacks was predictable, since the "mergers" were implemented in a manner that minimized opportunities for black employees.[15] Thus, while the 1968 LOP changes may have helped to rationalize the Company's progressions from a

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or physical condition required a transfer back; apart from this eventuality the initial transfer was irrevocable *(id.)*. Albemarle recognized the right to transfer only to the bottom-level position in a new LOP (A. 292). The contract gave transferring employees department and job seniority in their new classification equal to their previously accumulated seniority (Section 10.2.2, A. 479); however it did not provide for the use of such "carry-over" job seniority in subsequent promotions to positions above the classification transferred into (A. 479, 239). The contract did provide for carry-over rate retention or "red-circling" privileges (Section 10.2.3, A. 479-80, 233). Since the contract had no provision for posting job vacancies or for any other formal method of informing employees of particular job opportunities, it left black employees totally dependent on a word-of-mouth network emanating, of course, from Albemarle's white supervision and management, for information about job openings for which they might apply (A. 241-242).

[14] The court noted that blacks occupied the bottom 25 job positions in the "integrated" Woodyard. The same chart shows that whites occupied the top 26 positions (A. 485-6).

[15] Thus the black Brokeman LOP in the A Paper Mill was tacked on to th bottom of the short and relatively low-paying white Beater Room LOP but remained cut off from the high-paying A Mill Paper Machine LOP (compare A. 109, 110). In the Woodyard, the separate black Chipper Crew "dovetailed" into the white Crane Operator LOP with the result that only *one* black job (Chipper Operator #2) was placed ahead of a single white job (Chain Operator); all other blacks remained behind all other whites,

functional standpoint,[16] they did little to overcome the isolation of black employees in inferior positions.

The 1968 merger of segregated extra boards preserved the pre-existing patterns of segregation. Although employees could thereafter move from the merged extra board into any LOP (subject to test, educational, and qualifications requirements), recall priority for a particular LOP was reserved to employees who had previously worked in that LOP during the time of strict segregation (A. 486). As the district court found, "[t]he effect of this practice is that black employees are recalled to black jobs and white employees are recalled to white jobs" (*id.*).

The income disparity between white and black workers under the regime described above was substantial. The all-black LOPs were among the lowest paying in the mill; the all-white LOPs were among the highest paying; and in

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locked in job seniority order *(id.)*. A separate Service Department was established by removing the black Service Crew LOP from the Woodyard and placing it beneath the black Payloader job from the Pulp Mill; no blacks gained access to any white jobs by this move *(id)*. The Pulp Mill Department underwent substantial changes, without benefit to that department's black employees. The white Kamyr Operator job was removed from the white Digester LOP and placed at the top of the black progression leading to Lift Truck Operator (compare A. 109, 110, A. 481-2); however, within a few months the Kamyr was shut down, depriving blacks of access to that job (A. 245). A number of other positions (Bark Burner, Boiler Operator) were removed to another department, the Boiler Room, and there consolidated with the existing Fireman LOP (compare A. 109, 110); but there is no evidence that these black jobs were then staffed (see A. 481-4), and even if so, they were placed beneath the white jobs brought into their department (A. 109).

[16] The record clearly shows, Albemarle's protestations notwithstanding (Br. 5), that departments such as the Pulp Mill and the A Paper Mill were *not* organized into functionally related LOPs before the 1968 mergers. See A. 231-2. Race may well have been the reason behind the non-functional LOPs.

racially mixed departments the white employees' wages greatly exceeded the blacks' wages.[17]

Proceedings Below

The proceedings in this case took place against the background of the historical discrimination practices described above. Plaintiffs filed their charges before the Equal Employment Opportunity Commission ("EEOC") on May 9, 1966 (A. 273-285) and their complaint on August 25, 1966 (A. 6-10). Defendants immediately filed motions to dismiss and for summary judgment challenging, *inter alia*, the maintenance of the class action (A. 1). In response to one of those motions and in reliance on newly amended Rule 23(b)(2), F.R.Civ.P., and the only then-existing precedent

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[17] The following table, based on the job composition data at A. 481-5 and the hourly wage rates for June 30, 1967 shown at Pl. Ex. 14, App. A, pp. 34 *et seq.*, graphically shows the disparities:

Segregated LOPs & Departments

Name & Race	*No. of Employees*	*Avg. Wage*
1. Woodyard Service Crew—Black	11	$2.45/hr.
2. A Mill Finishing—Black	5	2.47/hr.
3. Technical Service—White	23 (1 B)	2.58/hr.
4. Storeroom—White	3	2.79/hr.
5. Power Plant—White	16	2.94/hr.
6. Maintenance—White	138 (1 B)	3.42/hr.
7. Boiler Room—White	4	3.63/hr.

Racially Mixed LOPs and Departments

Name	*Racial Breakdown*		*Average Black Wage*	*Average White Wage*
1. Pulp Mill	7B	57W	$2.38/hr.	$3.08/hr.
2. B Paper Mill	6B	69W	2.40/hr.	3.24/hr.
3. B Mill Product	5B	70W	2.40/hr.	2.56/hr.
4. A Paper Mill	6B	48W	2.42/hr.	2.71/hr.
5. Woodyard Yard Crew	26B	34W	2.43/hr.	3.21/hr.

on Title VII class actions, *Hall* v. *Werthan Bag Co.*, 251 F. Supp. 184 (M.D. Tenn. 1966), plaintiffs filed a memorandum stating that no back pay was sought "for any member of the class not before the court" (A. 11-14). This position was based on the belief that, "It may well be that any employee seeking separate and specific relief such as an individual promotion should first address his claim to the [Equal Employment Opportunity] Commission" (A 14).[18]

In October, 1968, several of the corporate defendants executed a "corporate reshuffle" (A. 35) in which the mill's assets and liabilities changed hands (A. 31-34, 41-42). Thereafter, on September 29, 1970, the district court granted plaintiffs' motion to join the successor and parent corporations of the initial defendant company (A. 38-39). In its ruling, the Court noted that Rule 54(c), F.R.Civ.P., required it to grant plaintiffs all relief to which they were entitled, whether specifically pleaded or not, and that the back pay issue was "litigable" (A. 38). Plaintiffs' claim for back pay had in fact been explicitly stated to counsel for Albemarle in a telephone conversation on April 8, 1970.[19] Albemarle's counsel indicated his awareness of the claim in a letter to the Court dated June 12, 1970 (A. 29).

On March 8, 1971, this Court handed down *Griggs* v. *Duke Power Co., supra.* Albemarle thereupon retained a

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[18] That possibility was subsequently rejected by the courts, see *Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969); *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969).

[19] See "Memorandum of Counsel for the Defendant 'Old' Albemarle Paper Company," filed August 17, 1970, p. 9 [not reproduced in Appendix].

This was just over 3½ years after suit was brought, rather than 5 years as the district court stated in denying back pay (A. 498). This notice came well over 15 months before trial began.

testing expert, Dr. Joseph Tiffin, to perform a validation study of its test battery in the few months remaining before trial (A. 489). Dr. Tiffin began to work on the study in April or May of 1971 (A. 185-6) and produced his report (A. 431-8) just in time for trial in July, 1971. The Tiffin report concluded that both the Beta and the Wonderlic A tests could properly be used as Albemarle was using them (A. 438, 491, 171). The conclusion was based on a correlation analysis which purported to demonstrate that at least one of Albemarle's three tests was significantly related to performance on nine of ten job groups studied (A. 431, 491). Dr. Tiffin conducted his study by the "concurrent criterion-related validation" method (A. 490). He selected and grouped jobs from the middle to upper range of 10 LOPs in five different departments (A. 432-7). All employees in those job groups, except a few who refused, took the tests for correlation purposes (A. 490, 186). These employees' supervisors were asked to rate their job performance (A. 490, 187). No separate study was made of correlations between test scores and job performance of black employees.

In the months before trial the district court entered a series of orders related to case management and the class action. On June 15, 1971, the court defined plaintiffs' class and "reserved ruling" on whether it could recover back pay (A. 46-7). On June 18, 1971, the court entered an order barring all parties and their counsel from communicating directly or indirectly with class members during the period when they received notice and when final trial preparation took place (A. 48-9). On July 8, 1971, the court held that back pay could be awarded under *Robinson* v. *Lorillard Corp.*, 444 F.2d 791 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971), and directed that notice be given to class members requiring them to file a written "proof of claim"

as a precondition to individual recovery (A. 50-51, 55-56).[20] A total of 80 employees signed "proof of claim" forms bringing their back pay claims "before the court" (A. 70-85).

After trial, on November 9, 1971, the district court entered findings of fact, conclusions of law, and judgment. The court held that defendants' seniority system both before and after the 1968 revisions had perpetuated the effects of past discrimination and was not required by "business necessity" (A. 495-497). Accordingly, the court decreed substitution of a plant seniority system with job posting, red-circling, and minimum residency periods (A. 499-502). The court also held unlawful Albemarle's high school education requirement and permanently enjoined its use (A. 497, 502).[21] However, the district court examined the test battery for job-relatedness and concluded that it had been adequately validated and was, therefore, permissible under Title VII (A. 497, 495). Finally, the court allowed no back pay (A. 502). It recited three reasons for denying plaintiffs' claim: that Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g), vests the district court with discretion to withhold back pay; that Albemarle had exhibited good faith in attempting (unsuccessfully) to comply with the Act; and that plaintiffs' allegedly late assertion of their back pay claim might have prejudiced defendants (A. 497-8).

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[20] The notice provided that failure to file "proof of claim" by July 22, 1971, four days before trial, would cause claims to be "forever barred" (A. 56).

Plaintiffs thereupon moved for leave to communicate with class members for purposes of trial preparation (A. 57), for clarification of the "opt-in" notice provisions (A. 64), and for severance of back pay proceedings from the initial determination of liability (A. 68). The court did not rule on these motions.

[21] There was no appeal from these two aspects of the court's ruling.

The Court of Appeals reversed in plaintiffs' favor on both the testing and back pay issues (A. 511-524). The Court's opinion held both that the testing program had an adverse impact on black employees and that Albemarle had failed to prove it demonstrably job-related as required by *Griggs* (A. 513-520). The Court further held that the purposes of Title VII require that back pay be awarded to compensate for wages lost due to discrimination, in the absence of "special circumstances that would render such an award unjust" (A. 520-524), and that no such circumstances appeared in this record (A. 524).

Summary of Argument

I.

This Court's decision in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971), controls the question of whether the use of various tests to determine promotions violated the Title VII rights of black employees. The Court of Appeals properly held that all of the tests used disproportionately excluded blacks from formerly white jobs. The Company, on the other hand, failed to meet the burden imposed by *Griggs* to demonstrate "a manifest relationship to the employment in question." In particular, Albemarle did not present sufficient proof that the tests were in fact accurate predictors of job performance, or that they had been validated pursuant to the guidelines established by the Equal Employment Opportunit[y] Commission and endorsed by this Court in *Griggs*. In contending that the guidelines should not be followed, Albemarle is asking this Court to overrule its well-reasoned opinion in *Griggs*, and to reject the consistent reliance of lower courts on that decision. The Court should reaffirm that the guidelines,

which incorporate accepted professional standards, provide the proper standards that should be met by employers in using tests that may deny equal opportunity to blacks and affirm the Fourth Circuit's application of *Griggs* in this case. Accordingly, the use of these unlawful tests was properly enjoined in order to prevent the continued denial of promotional opportunities to black employees.

II.

All Courts of Appeals ruling on the issue have held that Title VII authorizes an award of back pay to the members of the class of black (or other minority) employees adversely affected by discriminatory employment practices. The legislative history of the 1972 amendments to Title VII make it clear that Congress intended that such relief be available. Thus, a House provision that would have restricted the availability of back pay was rejected by the Senate and the Senate's position was adopted by the Conference Committee. The rejection of class back pay by this Court is thus unwarranted and would result in the substantial weakening of Title VII as an effective remedy against employment discrimination.

This Court should hold that back pay should be awarded to a class that has established a violation of Title VII unless special circumstances would render such an award unjust. This standard has been adopted by the Fourth, Fifth, and Sixth Circuits. It will ensure the effectuation of the Act's purpose, viz., to ensure that persons economically harmed by discrimination will receive restitution. Only if the victims of racial discrimination obtain the most complete relief possible, as do victims of unfair labor practices under the N.L.R.A., will the Congressional purpose be fulfilled. The standard does not, however, mean that district courts will have no discretion. Rather, there are instances

in which a denial of back pay may be justified; there is broad discretion in determining appropriate methods for calculating the amount of back pay and in the allocation of liability between defendants. Thus, the standard enunciated by the Court of Appeals is fully consistent with this Court's discussion of back pay in *Curtis* v. *Loether*, 415 U.S. 189 (1974), and with the holding regarding the award of attorneys' fees in *Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968). Finally, the facts of the present case do not present the kind of special circumstances that would justify a failure to award back pay.

ARGUMENT

I.

Albemarle's Testing Program Is Unlawful Under *Griggs* v. *Duke Power Company*.

In this case the Court must apply principles first enunciated in *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971). The facts concerning the tests involved here and their usage by Albemarle are closely similar to those in *Griggs*, see *supra* pp. 4-6. While *Griggs* provides the point of departure, it does not specifically answer the questions presented here. In *Griggs*, the employer had not attempted an empirical demonstration of the tests' job-relatedness but relied on their having been "professionally developed," *cf.* 42 U.S.C. § 2000e-2(h). Here, the employer has gone one step farther by conducting a correlation analysis purporting to show that its tests accurately predict job performance.

This case is controlled by *Griggs* principles despite the superficial difference in its factual context. Close scrutiny of the *results* of Albemarle's validation study demon-

strates that they fail to prove the test battery "manifestly job-related" in a majority of cases; therefore, here as in *Griggs*, the employer's test is unvalidated (part B.1, *infra*). Moreover, the Company's validation procedures were so inadequate that even those results cannot be credited; therefore, the employer has failed to carry its burden of showing its tests "manifestly job-related" (part B.2, *infra*).[22]

The significance of this case for the future of employment testing litigation in the post-*Griggs* era is plain. If Albemarle met its *Griggs* burden, then that case requires little more than a *pro forma* exercise submitted to the district court over the signature of a certified industrial psychologist.[23]

A. The Tests Adversely Affect Black Employees.

Albemarle's tests disproportionately screen out black employees from higher paying jobs. The Company does not deny that the statistical evidence shows a higher average

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[22] Both Albemarle and amicus curiae American Society for Personnel Administration have sought to inject an issue concerning the requirement of "differential validation," see 29 C.F.R. § 1607.4 (a) (A. 309), in this case. Co. Br. at 41, ASPA Br. at 28-30. They seek an advisory opinion. The district court found that such study in this case was "technically infeasible," *cf.* 29 C.F.R. § 1607.4 (A. 309). This was not an issue on appeal and is not before the Court.

[23] Albemarle's widely used Wonderlic test has never survived full judicial scrutiny in an employment discrimination case. Every appellate decision to pass on Wonderlic has held it unlawful in that it adversely affects black job candidates and has not been shown to be job-related. See, *e.g.*, *Griggs* v. *Duke Power Co.*, 401 U.S. 424 (1971); *Rogers* v. *International Paper Co.*, *supra*; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1372-3 (5th Cir. 1974); *Young* v. *Edgcombe Steel Co.*, 499 F.2d 97, 98 (4th Cir. 1974). The Company would justify using this test on the basis of little more than its expert's say-so, see part B, *infra*.

score for whites than for blacks on both tests.[24] Moreover, these average scores understate the black-white disparity because they do not take into account the large number of black employees who failed the tests but whose numerical scores were not recorded.[25] The district court found that when Albemarle administered the tests to incumbent black employees in 1964-5, "a majority of those who took the tests failed them" (A. 488).[25a] Furthermore, the district court found that the "skilled" LOPs and General Extra Board, for which the tests were required, remained "essentially segregated because of the inability of black employees to meet the educational and testing requirements" (A. 496).

Plaintiffs' expert witness, Dr. Raymond Katzell, testified that blacks generally score lower than whites on paper and pencil examinations; the reasons for this phenomenon are

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[24] Plaintiffs' Exhibit 10 shows that whites averaged over 7 points higher than blacks on the Wonderlic test, as Albemarle concedes, Br. at 29. Albemarle also does not dispute the existence of a disparity of over 3 points in test scores on the Beta examination, *id.* Plaintiffs' Exhibits 10 and 73 [not printed in Appendix] list the available test scores of Albemarle's employees.

[25] Plaintiffs' Exhibit 10 lists 12 black employees who failed the tests, without giving their scores. This number amounts to nearly half the number of blacks (15), whose scores were averaged; of those 15, only 3 failed. Thus, the average scores omit 80% of the blacks who did not pass. The averages also exclude the scores of at least 12 whites, listed only as "OK" on the tests, whose scores were apparently passing. This listing does not indicate whether unsuccessful employees failed the Wonderlic, the Beta, or both. However, it is pertinent that every black employee whose scores appear on Plaintiffs' Exhibit 10 either failed both tests, or passed both.

[25a] This is confirmed by the data on Plaintiffs' Exhibit 10, see n.25, *supra*, showing that of 27 blacks with recorded results 15 (56%) failed the test battery. By contrast, the exhibit shows that of whites with scores or test success indicated, 90% passed the Beta and over 95% passed the Wonderlic.

unclear but are thought to include inferior schooling[26] and the reaction of black test takers to examination situations (A. 1382-3, 493). Dr. Katzell recalled data showing that blacks usually score less well than whites on intelligence tests similar to the Beta (A. 406). Significantly, neither Albemarle's expert witness nor the Company itself, which had full access to all test scoring data, made any attempt to introduce evidence or opinion that blacks were not disproportionately screened out by Albemarle's tests or by written examinations generally. On this showing, the Court of Appeals held that "[t]he plaintiffs made a sufficient showing below that Albemarle's testing procedures have a racial impact," 474 F.2d at 138 (A. 515).[27]

The federal courts in employment discrimination cases have repeatedly found that tests like those used by Albemarle have an adverse impact on black job applicants. In particular, this Court and lower courts have consistently found that the Wonderlic test screens out blacks.[28] Re-

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[26] *Cf. Griggs* v. *Duke Power Co., supra,* 401 U.S. at 431.

[27] The Court of Appeals also referred to a study, *Negro Norms, A Study of 38,452 Job Applicants for Affirmative Action Programs* (1972), published by E. F. Wonderlic Associates, Inc. The study became available only after trial and was lodged with the Court of Appeals during briefing. It shows a median black score of 15 on the Wonderlic and a white median of 23 (pp. 11, 13).

[28] See, *e.g., Griggs* v. *Duke Power Co., supra,* 401 U.S. at 430 (Wonderlic); *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6592 (Wonderlic); *Franks* v. *Bowman Transportation Co.,* 495 F.2d 398, 412 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 644 (1974) ("the race-oriented Wonderlic"); *Duhon* v. *Goodyear Tire & Rubber Co.,* 494 F.2d 817, 818-819 (5th Cir. 1974) (Wonderlic); *Johnson* v. *Goodyear Tire & Rubber Co.,* 491 F.2d 1364, 1372 (5th Cir. 1974) (Wonderlic); *United States* v. *Georgia Power Co.,* 474 F.2d 906, 912 n.5 (5th Cir. 1973); *United States* v. *Jacksonville Terminal Co.,* 451 F.2d 418, 455-6 (5th Cir. 1971), *cert. denied* 406 U.S. 906 (1972); *Young* v. *Edgcombe Steel Co.,* 499 F.2d 97, 98, 100 (4th Cir. 1974) (Wonderlic); *Brito* v. *Zia Co.,* 478 F.2d 1200, 1203 (10th Cir. 1973); *Stamps* v. *Detroit Edison Co.,* 365

spondents are not aware of any reported final decisions in which tests like Albemarle's were found to be *without* adverse racial effect.[29] The other cases, therefore, confirm what this record shows: at Albemarle as elsewhere, written examinations typically operate as powerful "built-in-headwinds" to black employees, *cf. Griggs, supra,* 401 U.S. at 432.

This Court's ruling in *Griggs* was based on far less evidence of adverse racial impact than is presented here. The record in *Griggs* contained no evidence of actual test scores; rather, the Court properly assumed that the general observation of racial disparities would hold true, as plaintiffs' expert had testified, 401 U.S. at 430 n.6.[30]

F. Supp. 87 (E.D. Mich. 1973), *aff'd in pert. part sub. nom. EEOC* v. *Detroit Edison Co.*, —— F.2d —— (6th Cir. No. 74-1007, March 11, 1975).

The same finding of adverse impact has consistently held true in the case of written civil-service examinations of public employers. See, *e.g., Douglas* v. *Hampton*, —— F.2d —— (D.C. Cir. No. 72-1376, Feb. 27, 1975); *Davis* v. *Washington*, —— F.2d —— (D.C. Cir. No. 72-2105, Feb. 27, 1975); *Castro* v. *Beecher*, 459 F.2d 725, 729 (1st Cir. 1972); *Boston Chapter N.A.A.C.P., Inc.* v. *Beecher*, 504 F.2d 1017, 1019-20 (1st Cir. 1974); *Chance* v. *Board of Examiners*, 458 F.2d 1167, 1171 (2nd Cir. 1972); *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, 482 F.2d 1333, 1335 (2nd Cir. 1972); *Commonwealth of Pennsylvania* v. *O'Neill*, 348 F. Supp. 1084, 1089-90 (E.D. Pa. 1973), *aff'd in pert. part* 473 F.2d 1029 (3rd Cir. *en banc* 1973); *Carter* v. *Gallagher*, 452 F.2d 315, 323 (8th Cir. 1972), *upheld* 452 F.2d 327 (8th Cir. *en banc*), *cert. denied* 406 U.S. 950 (1972).

[29] *Stevenson* v. *International Paper Co.*, 352 F. Supp. 230 (S.D. Ala. 1972), on appeal 5th Cir. No. 73-1758 (same testing program as in *Rogers* v. *International Paper Co., supra*), and *Watkins* v. *Scott Paper Co.*, 6 EPD ¶ 8912 (S.D. Ala. 1973), on appeal 5th Cir. No. 74-1001, are both being appealed on this issue.

[30] As Judge Friendly recently observed, "complete mathematical certainty" of proof should not be required on this issue, particularly since a showing of adverse impact "simply places on the dependants a burden of justification which they should not be

Albemarle's assertions that there was "absolutely no evidence" of the Beta's disparate effect (Br. at 29), and "deficient" proof as to that of the Wonderlic (Br. at 30), ignores the many uncontradicted indications summarized above. Likewise the Company's charge that the adverse impact issue never arose in the district court is mistaken. The district court knew that under *Griggs* it need not have reached the issue of job-relatedness unless it found adverse impact. The court concluded that testing practices blocked black employes from the white lines of progression (A. 488, 496). Therefore, the court proceeded to examine the validation evidence as *Griggs* requires (A. 489-91).

There is no basis for this Court to reverse the well-supported finding below that Albemarle's testing program tended to exclude black workers.

B. Albemarle Failed to Prove the Job-Relatedness of Its Testing Program.

Because Albemarle's tests disqualify blacks at a higher rate than whites, the Company must show that the tests have "a manifest relationship to the employment in question," *Griggs* v. *Duke Power Co., supra,* 401 U.S. at 432. The Company attempts to meet that burden primarily by reliance on an empirical correlation analysis performed after the *Griggs* decision in the Spring of 1971.[31] That

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unwilling to assume," *Vulcan Society* v. *Civil Service Commission,* 490 F.2d 387, 393 (2nd Cir. 1973). See also, *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6592; *Boston Chapter NAACP, Inc.* v. *Beecher, supra,* 504 F.2d at 1021; *Douglas* v. *Hampton, supra,* slip op. at 8-13.

[31] Albemarle also suggests two further bases for a finding of job-relatedness, but these arguments are insubstantial.

First, it argues that the tests are job-related because they were designed to measure intelligence and reading ability, which were found to be necessary for successful performance in skilled LOPs (Br. 32-33). But this tautological reasoning begs the question which

validation study will not support a finding of job-relatedness.[32]

1. *Results Showing Lack of Job-Relatedness.*

Albemarle's own validation study demonstrates that the tests are not job-related for most of the jobs for which they are required. Albemarle's expert, Dr. Tiffin, attempted to validate each of three tests for each of ten job groupings. The groups came from 8 LOPs in 5 departments (A. 514). He reported, and the district court found, statistically significant correlations between job performance and test scores on one or another of the three tests in nine of the ten job groups (A. 431, 491). Such correlations were found for all three tests in only one of the ten groups (#4); and, for the Beta and either Wonderlic A or Wonderlic B,[33] in only one other group (#8) (A. 432). In eight of the ten groups, Dr. Tiffin did not find a significant correlation for both the Beta and a Wonderlic test; in three groups (#s 1, 2, 5) he found only one of the three tests

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Griggs frames: apart from the employer's purpose in utilizing the tests, is there convincing proof that the tests actually do measure ability to perform the job?

Second, it adverts to a purported validation study of the Beta test in 1958 (Br. at 33). The unwritten results of this study, which were described in conclusory terms (see p. 5, *supra*), are surely inadequate to meet the employer's burden of proof. And Albemarle made no effort to validate the Wonderlic test when introduced or thereafter, until 1971.

The district court relied on neither argument. Its holding of job-relatedness was based on the 1971 study.

[32] Technical terms encountered in the discussion of Albemarle's purported demonstration of job-relatedness are defined or described in an Appendix to this brief, "Glossary of Technical Terms Relevant to the Testing Issue."

[33] Test success on the Beta and either Wonderlic A or Wonderlic B is Albemarle's selection criterion, see p. 5, *supra*.

job-related; and in one group (#6) he found none of the tests had significant predictive value (*id.*).[34]

Thus, for 80% of the job groups studied, Albemarle's two-test battery, as used, was *not* found job related. This fact alone is dispositive. As the Court of Appeals held, "it was also error to approve requiring applicants to pass two tests for positions where only one test was validated" (474 F.2d at 140; A. 519). Cf. *United States* v. *Georgia Power Co., supra,* 474 F.2d at 916-7.

A close reading of the correlation data for particular tests casts further doubt on the conclusion Dr. Tiffin drew from the results. In ten correlations of the Beta test, he found only three statistically significant relationships, six correlations not deemed scientifically significant, two perfectly random correlations,[35] and one negative correlation.[36] Moreover, the study finds notable discrepancies between the

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[34] Dr. Tiffin's results are summarized in the following table in terms of whether statistically significant correlations were found:

Job Group	*Statistically Significant Correlations?*				
[by number]	Beta	W-A	W-B	All 3	B plus W (A orB)
1	No	Yes	No	No	No
2	Yes	No	No	No	No
3	No	Yes	Yes	No	No
4	Yes	Yes	Yes	Yes	Yes
5	No	Yes	No	No	No
6	No	No	No	No	No
7	No	Yes	Yes	No	No
8	Yes	No	Yes	No	Yes
9	No	Yes	Yes	No	No
10	No	Yes	Yes	No	No

Source: A. 432, compare A. 431.

[35] Job groups 3 and 5 show 0.00 correlation coefficients (A. 432). This means that the relationship between test scores and job performance was haphazard.

[36] Job group 6 shows a —.50 coefficient (A. 432), indicating that the higher test scorers performed less well on the job.

correlations found for the supposedly interchangeable Wonderlic Forms A and B.[37]

No correlation results were reported for many LOPs to which testing applied during the period relevant to this case. The district court found that test requirements had applied in 14 LOPs in 8 departments since 1963 (A. 487). Although operations had been curtailed in some of these LOPs or testing requirements otherwise eliminated after 1968, the relationship of the two tests to all the LOPs is relevant both as to back pay liability and for its bearing on the tests' job-relatedness in the similar LOPs to which testing currently applies. In any event, the results are not convincing even with respect to the four departments in which testing continued.[38]

The Court of Appeals correctly concluded that Albemarle showed too little evidence of job-relatedness for too small a part of its testing program to meet the burden of *Griggs*. Even taken at face value, the study's results do not substantiate a claim of job-relatedness for Albemarle's tests as they have been used.

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[37] The two forms are identical in form and content (compare A. 297-300, A. 301-304) and are supposed to be utilized as alternative forms of a single test. E. F. Wonderlic Associates, Wonderlic Personnel Test Manual 2 (1961).

Nevertheless, in one job group (#1), Wonderlic A achieved a rare perfect (1.00) correlation, while Wonderlic B showed no significant correlation (A. 432). In another (#8), Wonderlic B correlated perfectly but Wonderlic A was negatively related to job performance (*id.*).

[38] The Beta test correlated significantly only with the Technical Services job group (#4) and one (#2) of three Pulp Mill groups. It failed to correlate significantly with two other Pulp Mill groups (#s 1, 9), the Power Plant group (#10), and all 3 B Mill groups (#s 5, 6, 7). Wonderlic A did not show significant correlations for one of three groups in both the B Mill (#6) and the Pulp Mill (#2). Wonderlic B failed to show significant job-relatedness for two of three groups in both the B Mill (#s 5, 6), and the Pulp Mill (#s 1, 2). (A. 432)

2. *Inadequacy of the Validation Study.*

The Court of Appeals held Albemarle's validation procedures inadequate to support any conclusion of job-relatedness (474 F.2d at 139, A. 516).[39] It measured the study's deficiencies in part by standards embodied in the EEOC Guidelines on Employee Selection Procedures, 29 C.F.R. § 1607 (1970), A. 516-520. Albemarle attacks the Court's reliance on these Guidelines as improper (Br. 34-36).[40] The issues raised by the validation procedures therefore turn both on the weight to be given the EEOC Guidelines and on the specific failures of the study to comply with sound validation practice.

This Court in *Griggs* endorsed the Guidelines:

> The Equal Employment Opportunity Commission, having enforcement responsibility, has issued guidelines interpreting § 703(h) to permit only the use of job-related tests. The administrative interpretation of the Act by the enforcing agency is entitled to great deference. . . . Since the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress. 401 U.S. at 434. (footnote and citations omitted)

Its holding is consistent with a line of decisions stating that courts should defer to the subject-matter expertise of administrative agencies designated by Congress to imple-

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[39] An explanation of the proper method of validating a test by plaintiffs' expert witness appears at A. 205-6. Dr. Tiffin did not dispute that explanation (A. 209).

[40] Albemarle appears to concede that the validation procedures fall short of the Guidelines standards.

ment regulatory statutes.[41] Virtually every lower court confronted with a test-validation issue in a private employer discrimination case has agreed that the Guidelines are appropriate standards.[42] The Guidelines have appeared so persuasive and reasonable to the courts that many circuits have also looked to them in public-employer testing cases not brought under Title VII.[43]

Petitioner Albemarle and amicus ASPA criticize the Guidelines as unreasonably restrictive and their judicial implementation as unnecessarily rigid. But the courts have not required slavish adherence to each detail of the Guidelines.[44] The Court of Appeals did not do so in this case. Rather, the courts have taken the Guidelines as sensible, reasonable general principles that should ordinarily be

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[41] *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *United States* v. *City of Chicago*, 400 U.S. 8, 10 (1970); *Power Reactor Development Co.* v. *Electrical Union*, 367 U.S. 396, 408 (1961); *Trafficante* v. *Metropolitan Life Ins. Co.*, 409 U.S. 205, 210 (1972); *N.L.R.B.* v. *Boeing Co.*, 412 U.S. 67, 75 (1973).

[42] See, *e.g.*, *United States* v. *Jacksonville Terminal Co.*, *supra*, 451 F.2d at 456; *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 913; *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 221 (5th Cir. 1974); *Rogers* v. *International Paper Co.*, *supra*, 9 EPD at p. 6593; *Brito* v. *Zia Co.*, *supra*; *Young* v. *Edgcombe Steel Co.*, *supra*, 499 F.2d at 99.

[43] The EEOC Guidelines do not on their face necessarily apply to non-Title VII cases. See *Chance* v. *Board of Examiners*, *supra*, 458 F.2d at 1176-7. However, most courts follow them in such cases. See, *e.g.*, *Douglas* v. *Hampton*, *supra*, slip op. at 18; *Bridgeport Guardians, Inc.* v. *Civil Service Commission*, *supra*, 482 F.2d at 1337 n.6; *Vulcan Society* v. *Civil Service Commission*, *supra*, 490 F.2d at 394 n.8; *Commonwealth of Pennsylvania* v. *O'Neill*, *supra*, 348 F. Supp. at 1103; *Carter* v. *Gallagher*, 452 F.2d at 320, 326; *Western Addition Community Organization* v. *Alioto*, 340 F. Supp. 1351, 1353-4 (N.D. Cal. 1972); *Kirkland* v. *New York State Department of Correctional Services*, 374 F.Supp. 1361, 1370-1 (S.D.N.Y. 1974).

[44] See, *e.g.*, *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 913, 915; *Rogers* v. *International Paper Co.*, *supra*, 9 EPD at p. 6592.

followed but may be applied consistently with other appropriate procedures. The Guidelines themselves provide for flexible application. They are "designed to serve as a workable set of standards," 29 C.F.R. § 1607.1(c), A. 307-8, and require only that

> empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association [APA], 1200 17th Street, N.W., Washington, D.C. 20036. . . . (29 C.F.R. §1607.5(a), A. 311)

The Guidelines merely summarize the most important features of those "generally accepted procedures."

The Secretary of Labor has also published test validation guidelines applicable to federal contractors[45] very similar to the EEOC Guidelines (A. 321-8).[46] Like the EEOC Guidelines, the Secretary's guidelines adopt the APA Standards (see A. 325).[47] Those Standards (reprinted in pertinent part at A. 415-430) incorporate the judgment of the psychological profession (A. 172, 200) and

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[45] The Secretary's guidelines are issued pursuant to his enforcement responsibility under Executive Order 11246, 3 C.F.R. 339 (1965), prohibiting employment discrimination by federal contractors.

[46] "Testing and Selecting Employees by Government Contractors," 41 C.F.R. §§60-3.1 *et seq.* (1971), as amended January 17, 1974.

[47] American Psychological Association, "Standards for Educational and Psychological Tests and Manuals" (1966). Since entry of the decision below, the APA has revised its Standards with a 1974 edition. This revision is directed more specifically to employment tests and validation studies rather than educational examinations and manuals. Its principles are still consistent with the EEOC Guidelines. A copy has been filed with the clerk for reference by the Court.

are consistent with the two sets of Guidelines. In looking to the EEOC Guidelines, therefore, the Court of Appeals followed a broad consensus of informed opinion.[48]

Espinoza v. *Farah Manufacturing Co.*, 414 U.S. 86 (1973), does not imply a different result. The EEOC Guideline unsuccessfully advanced there attempted to define the scope of Title VII's basic proscription, *id.* at 92-4. In refusing to apply the Guideline, the Court had guidance from compelling indications of contrary Congressional purpose. *Espinoza* turned not on a matter within agency expertise but on "judicial application of canons of statutory construction," *Barlow* v. *Collins*, 397 U.S. 159, 166 (1970). In this case, the courts should welcome EEOC's expert technical assistance in defining validation procedures that carry out the statutory purpose articulated by *Griggs*.

The Court of Appeals' holding that Albemarle's validation study was inadequate to satisfy EEOC and professional standards (A. 516-520) is consistent with testimony by Dr. Richard Barrett that the study fell short of professional criteria set out in the APA Standards in a number of significant respects (A. 202-208).[49] The Court of Appeals centered its discussion of the validation study on two related faults: lack of job analysis and vague standards for rating job performance. Analysis of these shortcomings shows both how reasonable and sensible the EEOC Guidelines standards are, and how deficient the study was.

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[48] By contrast, in *Fishgold* v. *Sullivan Dry Dock & Repair Corp.*, 328 U.S. 275 (1946), on which Albemarle relies, the Court had to choose between two conflicting agency interpretations, 328 U.S. at 290. Moreover, the statute there construed had clear legislative history incompatible with the construction rejected by the Court, *id.*

[49] Dr. Richard Barrett is an industrial psychologist whose opinions this Court endorsed in *Griggs* (A. 197).

Dr. Tiffin made no analysis of job content for any of the jobs he studied (A. 174). No job descriptions had ever been developed at the mill (A. 148-9)[50] Both of plaintiffs' expert witnesses testified, without contradiction, that careful job analyses are crucial to *any* validation study (A. 371-2, 369, 200, 205). The EEOC Guidelines so provide, and specify that the analysis should identify "major or critical work behaviors," 29 C.F.R. § 1607.5(b)(3). Without an analysis, neither the test validator nor his raters know what aspect of job performance, or criterion, the test is supposed to measure, or does measure.[51] Plaintiffs' experts criticized the study for failing to meet this minimum standard (A. 386, 391, 206-7). The Fourth Circuit agreed (A. 517-18). In the importance attributed to the absence of job analysis, the court below has been joined by the Eighth

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[50] Albemarle implies that Dr. Tiffin knew the jobs at the Roanoke Rapids Mill because of his visits to other paper mills (Br. at 38). Without job descriptions, however, there was simply no proper way for Dr. Tiffin to rely on that assumption. Cf. 29 C.F.R. §1607.7 (A. 316).

[51] The 1966 APA Standards characterize definition of criterion measures "ESSENTIAL," and specify that such measures must relate to "significant aspects of performance," Standards, part C. 4 (A. 419-420). The 1974 Standards are even more explicit, see paragraphs E3, E3.1, E4, pp. 33-34. The Secretary of Labor's guidelines are to the same effect (A. 326). The professional literature also supports the necessity for criterion definition. See e.g., Byham & Spitzer, *The Law and Personnel Testing* (American Management Association, publisher) (1971), pp. 120-1; Cronbach, *Essentials of Psychological Testing*, New York: Harper & Row (1970), pp. 413-4; Guion, *Personnel Testing*, New York: McGraw-Hill (1965), pp. 116-21; Anastasi, *Psychological Testing*, London: MacMillan (3rd ed. 1968), pp. 417-9.

The arguments of Albemarle (Br. at 39-40) and amicus curiae ASPA (Br. at 22-24) that no job analysis or objective rating standard is necessary where ratings are on a "best overall employee" standard are superficial. See n. 53, *infra*. Their arguments might make more sense if "objective" performance criteria—such as production output—had been appropriately used. But the correlations in this case were based on a subjective criterion which was *not* shown to measure job performance accurately.

Circuit, which rejected another of Dr. Tiffin's studies in *Rogers* v. *International Paper Co., supra,* 9 EPD at p. 6593.

Lack of any job analysis was a major cause of the confusion prevalent among the supervisors who rated testees' job performance for validation purposes. Raters were given no meaningful criteria of performance. Dr. Tiffin testified that the ratings measured "job performance only, not personality, not attitude, those things were avoided in making the rating" (A. 166). He later defined this standard as meaning, "Excluding a man's attitude, just how well the guy can do the job when he's feeling right" (A. 175). Albemarle's personnel manager, who instructed the raters, told them to "determine which ones [employees] they felt irrespective of the job that they were actually doing, but in their respective jobs, did a better job than the person they were rating against" (A. 187). Given such amorphous rating standards, it is improbable that the ratings were closely tied to such critical performance criteria as would be identified by job analysis.

The EEOC Guidelines recognize the need for objective and job-related standards of employee performance as crucial to formulating any reliable validation procedure, 29 C.F.R. §1607.5(c)(3), (4). Absent such standards, founded on job analysis, there is no guarantee that the raters' criterion measurements are consistent or based on significant elements of the job.[52] The danger of "bias" in such ratings goes beyond the strictly racial dimension dis-

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[52] Our point is well summed up in two pithy statements from one of the leading texts on psychological testing, Guion, *Personnel Testing, supra:*

> It is not enough for a prediction to measure something reliably. What it measures must also be important (p. 51).
>
> Judgments make better criterion measures when they avoid glittering generalities and get down to specific behavior (p. 104).

cussed by Albemarle (Br. at 42). A supervisor comparing employees of the same race without the benefit of any pertinent criterion descriptions may unfairly rank the employees according to subjective or unimportant judgments.[53] For these reasons, the Fourth Circuit was properly unimpressed by Albemarle's correlation data based on such ratings (A. 517-8). The Eighth Circuit in *Rogers, supra,* 9 EPD at p. 6594, again agreed with this analysis. The ruling of both circuits is eminently sensible.

The Court of Appeals also rejected Albemarle's validation study because it purports, without justification, to approve testing practices much broader than those validated (A. 519-520). See p. 24, *supra.* The Court invalidated Albemarle's use of testing to screen all applicants for the "pool," regardless of what LOP they might later move into. Albemarle now criticizes this holding as based on an erroneous understanding of its test usage. However, the Court of Appeals based its holding on factual assertions in Albemarle's Brief on Appeal.[54] Moreover, the Court of

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[53] Different raters may well have different subjective perceptions of what is "best" (i.e. quantity or quality of output; attitude; regularity and dependability, etc.). The accuracy of their ratings will vary with their presumptions. Moreover, different jobs may require different answers which may not be forthcoming from raters with their own predilections. "Often a rating reflects the personal relation between man and supervisor rather than the quality of a man's work." Cronbach, *Essentials of Personnel Testing, supra,* p. 127.

[54] In its brief to the Fourth Circuit, Albemarle argued,

> Since Employer employs people originally into a pool or extra board from which the employee may move into any one of the lines of progression . . . it is not known at the time of hire into the pool in which line the employee will be placed. So there is nothing wrong with requiring him to be available for any line [by test qualifications]. Brief on Appeal at p. 32.

Here, however, Petitioner argues,

> Unless it is assumed that Albemarle is requiring satisfactory test scores as a condition of employment for all applicants for

Appeals correctly concluded that a purported test validation for some jobs would not support testing for different jobs in the absence of job analyses showing the two sets of jobs related in content or similarly dependent on criteria measured by the test, see EEOC Guidelines, 29 C.F.R. § 1607.4(c)(2) (A. 518-9).

C. Testing Should Be Enjoined.

Albemarle argues that its testing program should not have been enjoined even if it was properly held not demonstrably job-related (Br. at 47-50). The Company suggests that it should have another opportunity on remand to validate its tests properly; in the interim it would continue to use them to screen employees.

The Company's argument is based on the erroneous assertion that the Fourth Circuit's decision would allow "no further consideration" of Albemarle's testing program (Br. at 48). In fact, it is always open to employers to utilize employment tests in a manner which does not exclude blacks or to prove such tests job-related under proper standards. The real issue here is whether, when adverse impact is demonstrated and no test justification is shown, the employer may continue to utilize tests while attempting to validate them.

Griggs v. *Duke Power Co., supra,* teaches that, "[i]f an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited," 401 U.S. at 431, and places the burden of that showing on the test-user, *id.* at 432. Albemarle would have the Court reverse those principles. Since the

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> the pool and thereby making the tests indirectly applicable to lines of progression for which the tests are not validated, there is no discrimination by reason of the tests. There is no evidence to support that assumption. . . . (Br. at 46).

Company has failed to show its tests job-related, they must be prohibited unless and until the proper demonstration is made.

The EEOC Guidelines narrowly define the conditions under which unvalidated tests may be temporarily used, 29 C.F.R. § 1607.9.[55] Albemarle makes no showing that it meets these conditions. It simply seeks license to continue to discriminate while continuing to litigate.[56]

The issue is one of timing. This case has been in litigation nearly a decade. Four years have passed since trial. Further proceedings may be anticipated. During this period, Albemarle should not be free to continue its testing program until it has met the burden of proving it lawful. To hold otherwise would make a generation of black employees casualties of litigation which their representatives might ultimately win, but too late to affect their employment careers.

II.

Back Pay Should Be Awarded Where Discriminatory Practices Cause Loss of Earnings and There Are No Special Circumstances Which Render the Award Unjust.

A. Back Pay Is an Appropriate Remedy in Title VII Class Actions.

The principal questions presented concerning class back pay are the proper standard for awarding that remedy,

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[55] In particular, the Guidelines require that some "substantial evidence of validity" have been presented and that further validation studies likely to produce the necessary additional data be in progress, 29 C.F.R. §1607.9(a), (b) (A. 316-7).

[56] An injunction pending further litigation as to validity is particularly appropriate in this case. The effect of Albemarle's presently-unvalidated testing is to perpetuate the exclusion of black employees from jobs that before 1965 were closed to them by overt discrimination.

and its application here. See arguments B, C, *infra*. At the threshold to these issues, defendants argue that district courts are not authorized to award back pay to non-plaintiff class members in any Title VII cases, and that back pay awards are individual in character. This position has been rejected by the lower courts and by Congress.

The plaintiff class consists of persons who because of the defendants' segregation practices were placed in lower-paying jobs than similarly situated white employees (see pp. 11-12, *supra*). These practices adversely affected the earnings opportunities of the class as a whole, *id.* A common remedy—back pay in the amount lost due to discrimination—is sought. The discriminatory actions and the appropriate relief are of precisely the type contemplated by the authors of amended Rule 23, F.R.Civ.P. See Advisory Committee's Note to Proposed Rules of Civil Procedure, 39 F.R.D. 69, 102 (1966); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971).

The lower courts have unanimously ruled that Title VII authorizes back pay to members of a plaintiff class. The Third,[57] Fourth,[58] Fifth,[59] Sixth,[60] Seventh,[61] and Eighth[62]

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[57] *Rosen* v. *Public Service Gas & Electric Co.*, 409 F.2d 775, 780 (3rd Cir. 1969), 477 F.2d 90, 95-6 (3rd Cir. 1973).

[58] *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 802.

[59] *United States* v. *Georgia Power Co.*, *supra*, 474 F.2d at 919-21; *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F.2d 1364, 1375-77 (5th Cir. 1974); *Pettway* v. *American Cast Iron Pipe Co.*, 494 F.2d 211, 256-7 (5th Cir. 1974); *Franks* v. *Bowman Transportation Co.*, 495 F.2d 398, 421-2 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 644 (1974); *Baxter* v. *Savannah Sugar Refining Corp.*, 495 F.2d 436, 442-4 (5th Cir. 1974), *cert. denied* 42 L.Ed.2d 308 (1974); *Rodriguez* v. *East Texas Motor Freight Co.*, 505 F.2d 40, 64-5 (5th Cir. 1974).

[60] *Head* v. *Timken Roller Bearing Co.*, 486 F.2d 870, 876 (6th Cir. 1973); *Meadows* v. *Ford Motor Co.*, —— F.2d ——, 9 EPD

Circuits have so held. No circuit court has held to the contrary. District court decisions and consent decrees awarding class back pay are commonplace.[61]

The Equal Employment Opportunity Act of 1972, P.L. 92-261, 86 Stat. 103, modified Title VII's back pay provision, §706(g), 42 U.S.C. §2000e-5(g), and provoked extensive legislative debate about the availability of class-wide remedies. The legislative history of the 1972 amendment demonstrates Congress's specific approval of class remedies including back pay.

The 1972 Amendments originated in the House. The bill which passed the House, the "Erlenborn bill", H.R. 9247, specifically precluded class actions by providing that the court could,

> order such affirmative action as may be appropriate, which may include reinstatement or hiring of employees, with or without back pay . . . . *No order of the court shall require* the admission or reinstatement

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¶9907 (6th Cir. 1975); *EEOC* v. *Detroit Edison Co.*, —— F.2d —— (6th Cir. No. 74-1007, March 11, 1975), *aff'g in pert. part Stamps* v. *Detroit Edison Co.*, 365 F. Supp. 87 (E.D. Mich. 1973).

[61] *Bowe* v. *Colgate-Palmolive Co.*, 416 F.2d 711, 719-21 (7th Cir. 1969), 489 F.2d 896, 902-04 (7th Cir. 1973); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1201-2 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

[62] *United States* v. *N. L. Industries, Inc.*, 479 F.2d 354, 378-9 (8th Cir. 1973).

[63] See, *e.g.*, decisions in *Laffey* v. *Northwest Airlines, Inc.*, 7 EPD ¶9277 (D. D.C. 1974), *entering order following* 366 F. Supp. 763 (D. D.C. 1973); *Russell* v. *American Tobacco Co.*, 374 F. Supp. 286, 300 (M.D. N.C. 1973); *Cooper* v. *Philip Morris, Inc.*, 9 EPD ¶9929 (W.D. Ky. 1974); *Myers* v. *Gilman Paper Co.*, 9 EPD ¶9920 (S.D. Ga. 1975); *Bush* v. *Lone Star Steel Corp.*, 373 F. Supp. 526, 536 (E.D. Tex. 1973); *Patterson* v. *American Tobacco Co.*, 8 EPD ¶9722 (E.D. Va. 1974); and consent decrees cited at p. 57, n.120, *infra*.

> of an individual . . . or *the payment to him of any back pay, if such individual . . . neither filed a charge nor was named in a charge or amendment thereto. . . .* (emphasis supplied)[64]

Senator Williams introduced a bill in the Senate, S.2515, which did not place any such restriction on class actions.[65] The Senate Committee on Labor and Public Welfare reported out the Williams bill on October 28, 1971 with recommendation that it pass, 117 Cong. Rec. 38030.[66] The Committee Report on Section 706(d) of the bill (dealing with EEOC Commissioners' charges) states:

> *This section is not intended in any way to restrict the filing of class complaints.* The committee agrees with the courts that Title VII actions are by their very nature class complaints,[16] and that *any restriction on such actions would greatly undermine the effectiveness of Title VII. S.Rep.* 415 at 27, 92nd Cong. 1st Sess. (1971) (emphasis supplied.)[67]

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[64] Two different bills were introduced in the House, early in 1971, the "Hawkins" bill, H.R. 1746, and the "Erlenborn" bill, 117 Cong. Rec. 212, 20622. The Hawkins bill did not contain any language restricting class action remedies.

[65] Senator Dominick introduced as S.2617 the Erlenborn bill which had been passed in the House, 117 Cong. Rec. 34104. There S.2617 was debated as an alternative tc the Williams bill.

[66] The same Committee also reported out the Erlenborn language, in the Dominick bill (S.2617), but without recommendation for passage, 117 Cong. Rec. 38030.

[67] Note 16 cited, *inter alia, Oatis* v. *Crown-Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968), and *Local 186, International Brotherhood of Pulp, Sulphite & Paper Mill Workers* v. *Minnesota Mining and Manufacturing Co.*, 304 F. Supp. 1284 (N.D. Ind. 1969). In *Oatis*, the court held that class members need not have filed EEOC charges in order to participate as co-plaintiffs so long as one class representative had so filed and the other class members assert common issues, 398 F.2d at 499.

Similarly, Senator Williams placed in the record a Section-by-Section Analysis explaining the changes later made in his bill on the floor.[68] The analysis of §706(f)(1) (authorizing EEOC to sue in district court to enforce Title VII) states:

> In establishing the enforcement provisions under this subsection and subsection 706(f) generally, *it is not intended that any of the provisions contained therein are designed to affect the present use of class action lawsuits under Title VII in conjunction with Rule 23 of the Federal Rules of Civil Procedure.* The courts have been particularly cognizant of the fact that claims under Title VII involve the vindication of a major public interest, and that any action under the Act involves considerations beyond those raised by the individual claimant. As a consequence, the leading cases in this area to date have recognized that Title VII claims are necessarily class complaints and that, accordingly, *it is not necessary that each individual entitled to relief under the claim be named in the original charge or in the claim for relief.* 118 Cong. Rec. 4942 (1972) (emphasis supplied)

The Williams bill thereupon passed the Senate, 118 Cong. Rec. 4944 (1972).

In reconciling S.2515 with H.R. 1746 the Conference Committee adopted the Senate position on class actions. The Section-by-Section Analysis of the Committee's agreement recites the language quoted just above in its entirety and adds: "A provision limiting class actions was con-

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[68] A compromise between Senators Dominick and Williams on other contested provisions led to the substitution of an amendment by Senator Dominick (No. 884, 118 Cong. Rec. 3808 (1972)), which replaced the pertinent provisions of the Williams bill, but which did not add any restrictions on class actions.

tained in the House Bill and specifically rejected by the Conference Committee," 118 Cong. Rec. 7168, 7565 (1972).[69] Both chambers accepted this compromise bill, 118 Cong. Rec. 7170, 7573 (1972).

The back pay issue was in the forefront during Congress's consideration of class remedies under §706(g). Thus, Rep. Erlenborn on September 15, 1971 justified his limiting language by asserting that it would diminish unwanted back pay exposure.[70] Rep. Abzug, arguing in opposition to the Erlenborn limitation, also stressed the importance of the monetary award to effective class relief.[71] Moreover, the Senate Committee that eliminated the Erlenborn language cited with approval a class back pay case,

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[69] The Analysis also provides that,

> In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII. 118 Cong. Rec. 7168, 7565 (1972).

By this time, the Courts of Appeals had clearly indicated that class back pay awards are appropriate. See n.84, *infra*.

[70] *"We have class actions* where the Commission admittedly encourages individual complainants to file suit on their own behalf and *for the entire class that may be similarly affected. This,* plus the liability of backpay without limitation, *would create an horrendous potential liability.* We would provide a limitation on liability through a 2-year statute of limitations . . . .

> *We would also provide in the class action a limitation so that those who join in the class action or those who by timely motion to intervene could be considered as the proper class, but not all who may be similarly situated* but who are not even aware of the fact that a case has been filed . . . ." 117 Cong. Rec. 31973-4 (1971) (emphasis supplied).

[71] "The structure and pattern of employment discrimination will remain untouched unless large numbers of workers are affected. An award in favor of one complainant will do little to discourage an employer bent on discriminating against a class of employees, but an award—or even the possibility of an award—on behalf of an entire class can effectively discourage this kind of unlawful discrimination." 117 Cong. Rec. 32097 (1971).

Local 186, International Brotherhood of Pulp, Sulphite & Paper Mill Workers v. *Minnesota Mining and Manufacturing Co.*, 304 F. Supp. 1284, 1285, 1295 (N.D. Ind. 1969), see n. 67, *supra*.

In the face of this explicit legislative history, Albemarle and Local 425 argue that class-wide monetary relief is impermissible because it conflicts with Title VII's policy favoring conciliation of complaints (Co. Br. at 63, U. Br. at 31-33). Defendants both ignore the plain history, *supra*, and distort the Congressional intent when they elevate preference for conciliation to a remedial bar.

Although in enacting Title VII Congress hoped to facilitate the informal resolution of complaints through conciliation, the courts have consistently held that actual conciliation of EEOC complaints is not a prerequisite to suit under Title VII.[72] The Congressional purpose is fulfilled by requiring the charging party to file a complaint with EEOC and directing EEOC to serve the complaint on the respondent and offer its conciliation services, 42 U.S.C. §2000e-5(b).[73] An EEOC charge filed by an individual, which complains of practices of discrimination, satisfies Congress's intention of providing an opportunity for conciliation and, therefore, provides the basis for a Title VII class action, for the reasons set forth by the Fifth Circuit:

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[72] *Johnson* v. *Seaboard Air Line Railroad Co.*, 405 F.2d 645, 648-53 (4th Cir. 1968), *cert. denied* 394 U.S. 918 (1969); *Dent* v. *St. Louis-San Francisco Railway Co.*, 406 F.2d 399, 402-3 (5th Cir. 1969), *cert. denied* 403 U.S. 912 (1971).

[73] After filing his charge and allowing the conciliation period to run, the charging party need only receive a "right to sue" letter from EEOC in order to initiate suit under Title VII. 42 U.S.C. §2000e-5(f)(1); *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 798-9 (1973); *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44-5 (1974).

> It would be wasteful, if not vain, for numerous employees, all with the same grievance, to have to process many identical complaints with the EEOC. . . .
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> • • • • •
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> Racial discrimination is by definition class discrimination, and to require a multiplicity of separate, identical charges before the EEOC, filed against the same employer, as a prerequisite to relief through resort to the court would tend to frustrate our system of justice and order.[74]

Albemarle and Local 425 offer no evidence in support of their hypothesis that allowing class back pay would hinder conciliation. Both reason and experience refute that assertion, see pp. 57-59, *infra*. In any event, Congress has spoken clearly to their point, and explicity rejected it.[75]

Albemarle also argues that the class back pay remedy improperly extends the federal jurisdiction (Br. 62, 66). It relies on two diversity decisions, *Snyder* v. *Harris*, 394 U.S. 332 (1969), and *Zahn* v. *International Paper Co.*, 414 U.S. 291 (1973), that turn on the meaning of the "amount in controversy" requirement, 28 U.S.C. §1332(a). These cases have no bearing on a case brought under federal civil rights jurisdiction, 28 U.S.C. §1343. Respondents have met all the

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[74] *Oatis* v. *Crown-Zellerbach Corp.*, *supra*, 398 F.2d at 498. *Accord: Bowe* v. *Colgate-Palmolive Co.*, *supra*, 416 F.2d at 720. These remarks are particularly compelling in light of EEOC's huge and growing backlog of complaints, which already seriously interferes with its conciliation function.

Furthermore, despite its preference for conciliation, Congress intended that the ultimate responsibility for enforcing Title VII would repose in the courts and that the judicial remedy should be prompt and efficacious, 42 U.S.C. §2000e-5(f)(4), (5), *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. at 36 (1974).

[75] At least after the 1972 legislative activity, class back pay cannot fairly be labelled a "court-made rule" (cf. Co. Br. 63).

requirements of Title VII jurisdiction, 42 U.S.C. §2000e-5(f)(1), see n. 73, *supra* (A. 475).[76]

This Court should confirm the judgment of six circuits that class back pay is available in an appropriate Title VII action.

B. A Standard Directing District Courts to Exercise Their Discretion to Award Back Pay Unless There Are Special Circumstances Which Make the Award Unjust Is Appropriate in Light of the Clear Statutory Purpose of Title VII.

The district court denied back pay to black workers despite finding that the defendants' discriminatory practices relegated blacks to the lower-paying jobs and denied them equal promotional opportunity. The district court in denying back pay under these circumstances ruled as if the statutory purposes of Title VII placed no constraints on the exercise of its discretion to deny back pay. The Fourth Circuit, however, enunciated and applied a standard based on the purpose of the applicable statutory provisions.

> Thus, a plaintiff or a complaining class who is successful in obtaining an injunction under Title VII of the Act should ordinarily be awarded back pay unless special circumstances would render such an award unjust.

474 F. 2d at 142; A. 524. The Fifth[77] and Sixth[78] Circuits

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[76] *Cf. Sosna* v. *Iowa*, 42 L.Ed.2d 532, 549 n.1 (1975), Mr. Justice White, dissenting.

[77] *Johnson* v. *Goodyear Tire & Rubber Co., supra*, 491 F.2d at 1375; *Pettway* v. *American Cast Iron Pipe Co., supra*, 494 F.2d at 251; *Franks* v. *Bowman Transportation Co., supra*, 495 F.2d at 421; *Baxter* v. *Savannah Sugar Refining Corp., supra*, 495 at 442-43; see *United States* v. *Hayes International Corp.*, 456 F.2d 112, 121 (5th Cir. 1972).

[78] *Head* v. *Timken Roller Bearing Co., supra*, 486 F.2d at 876; *Meadows* v. *Ford Motor Company*, —— F.2d ——, 9 EPD ¶9907 (6th Cir. 1975) at pp. 6766-7.

have adopted the same standard as the Fourth, while the Third[79] and Seventh[80] Circuits have expressly stated that back pay should normally be awarded to Title VII plaintiffs who suffer economic loss as a result of discriminatory practices.[81]

The standards established by the Fourth, Fifth, and Sixth Circuits serve the important function of ensuring that the Congressional purpose embodied in Title VII is implemented by the district courts. It is clearly appropriate, as the Fourth Circuit stated, that

> in determining the proper scope of the exercise of discretion, the objective sought to be accomplished by the statute must be given great weight. *Hecht Co.* v.

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[79] *Rosen* v. *Public Service Electric and Gas Company, supra*, 477 F.2d at 96; *Jurinko* v. *Wiegand Co.*, 477 F.2d 1036, 1046 (3rd Cir. 1973), vacated on other grounds, 414 U.S. 970 (1973), reinstated 497 F.2d 403 (3rd Cir. 1974).

[80] *Bowe* v. *Colgate-Palmolive Company, supra*, 416 F.2d at 720; *Sprogis* v. *United Air Lines, Inc., supra*, 444 F.2d at 1201-02.

[81] The Eighth Circuit has stated that awards of back pay are important in order to eliminate "the last vestiges of an unfortunate and ignominious page [employment discrimination] in this country's history." *United States* v. *N. L. Industries*, 479 F.2d 354, 379 (8th Cir. 1973). However, the Eighth Circuit further stated that,

> [d]espite what we have said as to the *appropriateness* of back pay, we do not make such an award here. In this Circuit the law in regard to back pay has not been adequately defined to provide employers and unions with notice that they will be liable for a discriminatee's economic losses. . . . (emphasis added)

Id., 479 F.2d at 380; see also *Norman* v. *Missouri Pacific Railroad*, 497 F.2d 594, 597 (8th Cir. 1974), *cert. denied* 43 LW 3416 (1975), but see *United States* v. *St. Louis-San Francisco Ry. Co.*, 464 F.2d 301 (8th Cir. *en banc* 1972), *cert. denied* 409 U.S. 1107 (1973).

Even accepting the Eighth Circuit's description of the state of the law as "unsettled," the denial of back pay for that reason was clearly improper in light of this Court's statement that "a court is to apply the law in effect at the time it renders its decision . . . ." *Bradley* v. *Richmond School Board*, 416 U.S. 696, 714 (1974).

> *Bowles,* 321 U.S. 321, 331, . . . Where a district court fails to exercise discretion with an eye to the purposes of the Act, it must be reversed. *Wirtz* v. *B.B. Saxon Co.,* 365 F.2d 457 (5th Cir. 1966), *Shultz* v. *Parke,* 413 F.2d 1364 (5th Cir. 1969). 474 F. 2d at 141-2 (A. 523).[82]

The Fourth Circuit concluded that a "clear purpose" of Title VII is to compensate workers for economic loss suffered as a result of unlawful employment practices. This conclusion is fully supported by judicial authority and the legislative history. It would be anomalous if Congress outlawed discrimination in employment without intending full relief for those who suffered from discrimination. Cf. *Louisiana* v. *United States,* 380 U.S. 145, 154 (1965). The decisions of the Courts of Appeals have unanimously held that compensation for economic harm is a fundamental part of Title VII's purpose.[83] Moreover, Congress in reviewing the remedy of back pay during the process of amending Title VII in 1972, ratified the interpretation of the Courts of Appeals which had held that back pay was

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[82] See *Mitchell* v. *Robert de Mario Jewelry, Inc.,* 361 U.S. 288, 291-2 (1960), discussed *infra* at pp. 52-53.

[83] See *e.g., United States* v. *Georgia Power Company, supra,* 474 F.2d at 921:

> Given this Court's holding that '[a]n inextricable part of the restoration to prior [or lawful] status is the payment of back wages . . . it becomes apparent that this form of relief may not properly be viewed as a mere adjunct of some more basic equity. It is properly viewed as an integral part of the whole of relief . . .

Rosen v. *Public Service Electric and Gas Company, supra,* 477 F.2d at 96; *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 252; *Head* v. *Timken Roller Bearing Company, supra,* 486 F.2d at 876; see *United States* v. *N. L. Industries, supra,* 479 F.2d at 379; see also *Pettit* v. *United States,* 488 F.2d 1026, 1031-2 (U.S. Ct. Cls. 1973); *Mize* v. *State Division of Human Rights,* 33 N.Y.2d 53, 56, 349 N.Y.S.2d 364, 366 (N.Y. Ct. of Appeals, 1973).

an integral part of the relief which Congress intended.[84] Congress considered several questions concerning back pay in 1972; specifically, Congress considered amendments proposing to bar back pay in class actions,[85] to require a jury trial for Title VII cases involving back pay,[86] and to impose a restrictive statute of limitations.[87] In approving class actions, rejecting jury trials, and selecting a more liberal statue of limitations Congress showed a consistent purpose to make Title VII's remedial provisions, particularly back pay, apply broadly to afford relief from discrimination.[88]

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[84] *Bowe* v. *Colgate-Palmolive Company*, 416 F.2d 711, 720 (7th Cir. 1969); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802-04 (4th Cir. 1971), *cert. dismissed* 404 U.S. 1006 (1971); *Sprogis* v. *United Air Lines, Inc.*, 444 F.2d 1194, 1202 (7th Cir. 1971), *cert. denied* 404 U.S. 991 (1971).

[85] See pp. 37-40, *supra*.

[86] The Senate rejected Amendment No. 908, introduced by Senator Ervin, which would have required a jury trial in Title VII cases. 118 Cong. Rec. 4917, 4919-20 (1972) (remarks of Senators Ervin and Javits).

[87] The Erlenborn bill, H.R. 1746, which passed the House, had contained a provision, section 3(e), limiting back pay liability to two years before the filing of the complaint in court. The Williams Bill, S.2515, which passed the Senate contained a provision limiting liability to a period no longer than two years prior to a filing of a *charge with the EEOC*. See S.2515, §706(g)(2); 118 Cong. Rec. 4942 (1972) (explanation by Senator Williams). The Conference Committee adopted the more liberal Senate provision. 118 Cong. Rec. 7168 (1972) (Section-by-Section Analysis of the Conference Committe). See 42 U.S.C. §2000e-5(g).

[88] While Title VII did not previously have a specific statute of limitations, courts could in their discretion look to state statutes of limitations and other factors in determining the appropriate limits for back pay liability. Congress in specifying a liberal statute of limitation, which is tolled by the filing of an administrative charge rather than a later judicial complaint, provided for substantial back pay awards. See Sape and Hart, *Title VII Reconsidered: The Equal Employment Opportunity Act of 1972*, 40 GEO. WASH. L. REV. 824, 882-83 (1972).

The Conference Commitee in its Section-by-Section Analysis made it patently clear that §706(g) was designed to afford full relief.

> The provisions of this subsection are intended to give the courts *wide discretion exercising their equitable powers to fashion the most complete relief possible.* In dealing with the present section 706(g) the courts have stressed that the scope of relief under that section of *the Act is intended to make the victims of unlawful discrimination whole,* and that the attainment of this objective rests not only upon the elimination of the particular unlawful employment practice complained of, but also requires that persons aggrieved by the consequences and effects of the unlawful employment practice be, so far as possible, restored to a position where they would have been were it not for the unlawful discrimination (emphasis supplied). 118 Cong. Rec. 7168 (1972); see also 118 Cong. Rec. 4942 (1972) (Section-by-Section Analysis introduced into Record by Sen. Williams).

Defendants' argument that the discretion of the district courts may be used arbitrarily to deny "the most complete relief possible" from the economic effects of discrimination is therefore directly contrary to Congress' express purpose. That purpose would be frustrated if district courts could, as a matter of discretion, contravene the Congressional intent by ruling that back pay is not an essential part of relief. Rather, the statutory purpose requires,

> that where employment discrimination has been clearly demonstrated . . . victims of that discrimination must be compensated if financial loss can be established. . . . To implement the purposes behind Title VII, a court should give 'a wide scope to the act in order to

> remedy, as much as possible, the plight of persons who have suffered from discrimination in employment opportunities'. (footnote omitted)

Johnson v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1375.[89]

A similar Congressional purpose underlies the award of back pay to victims of unlawful employment practices under the National Labor Relations Act, U.S.C. §§151 et seq. The NLRA back pay remedy is particularly pertinent to the construction of the Title VII provision. As the similarity in language between the remedial sections of the two statutes would suggest,[90] the legislative history of Title VII plainly indicates that the NLRA back pay remedy served as a model for drafting Title VII.[91]

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[89] See cases cited in nn.83, 84, *supra.*

[90] Section 10(c) of the NLRA, 29 U.S.C. §160(c) authorizes "affirmative action including reinstatement of employees *with or without* back pay . . ." (emphasis added); Section 706(g) of Title VII, 42 U.S.C. §2000e-5(g) is closely parallel, authorizing "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, *with or without* back pay. . . ." (emphasis added).

[91] On March 30, 1964 Senator Humphrey, one of the principal sponsors of the bill, stated that:

> The relief sought in such a suit would be an injunction against future acts or practices of discrimination, but the court could order appropriate affirmative relief, such as hiring or reinstatement of employees and the payment of back pay. This relief is similar to that available under the National Labor Relations Act. . . .

110 Cong. Rec. 6549 (1964). See also 110 Cong. Rec. 7214 (1964) (Interpretative Memorandum placed into the Record by Senators Clark and Case); H.R. Rep. No. 914, 88th Cong. 1st Sess. 112 (1963); see *United States* v. *Georgia Power Company, supra,* 474 F.2d at 921 n.19; *Pettway* v. *American Cast Iron Pipe Company, supra,* 494 F.2d at 252; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1974,*

Beginning with *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177 (1941), this court has emphasized the importance of back pay in cases brought pursuant to the NLRA. While *Phelps* decided several important questions concerning the application of the NLRA, it involved only a narrow computational issue concerning back pay.[92] The Court in *Phelps* stressed the importance of back pay awards even though the propriety of such award was not directly at issue:

> Making the workers whole for losses suffered on account of an unfair labor practice is a part of the vindication of the public policy which the Board enforces.

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84 HARV. L. REV. 1109, 1259 n.349 (1971); Davidson, *"Back Pay" Awards Under Title VII of the Civil Rights Act of 1964*, 26 RUTGERS L. REV. 741, 742-43 (1973). See also n.92, *infra*.

[92] The NLRB had ordered back pay to specific workers equal to what they would have earned absent the unlawful conduct of the company less their actual earnings. The Second Circuit modified the formula for calculating back pay by deducting earnings which the workers "failed without excuse to earn".

The NLRB appealed the modification of its formula for calculating back pay because it argued that the Second Circuit's formula would create administrative difficulties. The Supreme Court rejected the Board's arguments stating that there need not be "stereotyped formulas" for computing back pay and that the Board has discretion to derive formulas which will "attain just results in diverse situations." *Phelps Dodge Corp.* v. *NLRB, supra* at 198.

The defendants inappropriately rely on this language in support of their position that district courts have practically unfettered discretion to *deny* back pay. Co. Br. at 52; U. Br. at 28; see also the dissenting opinion of Judge Boreman, 474 F.2d at 145 (A. 529-30).

It should be noted that Congress in structuring the Title VII back pay provision on the NLRA provision incorporated NLRA case law concerning the calculation of back pay awards, as first expressed in *Phelps*, into §706(g) of Title VII, 42 U.S.C. §2000e-5(g):

> Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable.

Id. at 197-98.[93] The Supreme Court has consistently adhered to this principle,[94] and the Courts of Appeals[95] and the NLRB[96] have consistently applied it.[97]

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[93] Moreover, the actual holding of the Court in *Phelps* reversed the exercise of discretion by the NLRB in calculating the amount of the back pay award. This ruling directly supports the Fourth Circuit's decision that the discretionary rulings of the district court may not be upheld if they are contrary to the purposes of the statute.

[94] See e.g., *Nathanson* v. *NLRB*, 344 U.S. 25, 27 (1952); *NLRB* v. *Seven Up Bottling Co.*, 344 U.S. 344, 347 (1953); *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 278 (1956); *NLRB* v. *Rutter-Rex Manufacturing Co.*, 396 U.S. 258, 263 (1969).

[95] See e.g., *NLRB* v. *Mastro Plastics Corp.*, 354 F.2d 170, 178 (2nd Cir. 1965) *cert. denied* 384 U.S. 972 (1966); *Buncher* v. *NLRB*, 405 F.2d 787, 790-91 (3rd Cir. *en banc* 1969), *cert. denied* 396 U.S. 828 (1969); *NLRB* v. *International Union of Operating Engineers, Local 925*, 460 F.2d 589, 599 (5th Cir. 1972); *Bon Hennings Logging Company* v. *NLRB*, 308 F.2d 548, 555-56 (9th Cir. 1962); *NLRB* v. *Rice Lake Creamery Co.*, 365 F.2d 888, 891 (D.C. Cir. 1966).

[96] The NLRB policy of routinely awarding back pay has been consistently followed. In its very first published order, the Board awarded back pay, *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1, 51 (1935), *enf'd sub nom. NLRB* v. *Pennsylvania Greyhound Lines, Inc.*, 303 U.S. 261 (1938). From the first, the Board envisaged the "development of a practically uniform policy with respect to these orders requiring affirmative action." NLRB Annual Report, Vol. 1 (1936), p. 124. That policy has been that, "in all but a few cases involving discriminatory discharges, discriminatory refusals to employ or reinstate, or discriminatory demotions in violation of Section 8, subdivision (3), of the Act, the Board has ordered the employer to offer reinstatement to the employee discriminated against and to make whole such employee for any loss of pay he has suffered by reason of the discrimination." NLRB Annual Report, Vol. 2 (1937), p. 148. See also *N.L.R.B.* v. *A.P.W. Products Co.*, 316 F.2d 899, 904-905 (2nd Cir. 1963). *enf'ing* 137 NLRB 25 (1962).

[97] The broad application of "back pay" under the NLRA is particularly significant because, "if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it," Frankfurter, *Some Reflections on the Reading of Statutes*, 47 COL. L. REV. 527, 537 (1947).

Albemarle argues that Congress altered its original intention to model the Title VII back pay provision after the NLRA when it passed an amendment introduced by Senator Dirksen (Br. 52).[98] Congress' clear intent to base the Title VII remedy on the NLRA remedial provision was in no way affected by the Dirksen amendment. Section 706(e) of H.R. 7152, the predecessor of Title VII's §706(g) provided as follows:

> If the court finds that the respondent has engaged in or is engaging in an unlawful employment practice charged in the complaint the court may enjoin the respondent from engaging in such unlawful employment practices, and *shall* order the respondent to take such affirmative action, including reinstatement or hiring of employees, with or without back pay . . . as may be appropriate. (emphasis added)

110 Cong. Rec. 12814 (1964). The Dirksen amendment, in substance, simply changed the "shall", emphasized above, to "may".[99] Since the bill had already contained the provisions "with or without back pay" and "as may be appropriate",[100] the change of "shall" to "may" was, as Senator Humphrey explicitly stated, "a minor language change" which simply clarified the statute.[101]

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[98] Substitute amendment No. 656; see 110 Cong. Rec. 12807-20 (1964).

[99] 110 Cong. Rec. 12814 (1964); see 110 Cong. Rec. 12819 (1964).

[100] These provisions were, of course, in the bill when Senators Case, Clark and Humphrey stated that the back pay remedy was modelled on the NLRA, see footnote 91, *supra*. Also the sponsors of Title VII did not talk in mandatory terms, but rather stated that back pay "could" be awarded.

[101] 110 Cong. Rec. 12723-24 (1964) (remarks of Senator Humphrey).

The Court's implementation of the Fair Labor Standards Act of 1938, 29 U.S.C. §201 *et seq.*, provides further guidance as to the purposeful exercise of discretion by the federal courts in designing remedies for violations of Title VII. In *Mitchell* v. *Robert de Mario Jewelry, Inc.*, 361 U.S. 288 (1960), the district court, relying on its discretion, had denied compensatory relief to employees who had been unlawfully discharged.[102] In reversing a Court of Appeals affirmance Mr. Justice Harlan first reviewed the purpose which should guide the use of equitable discretion by the federal courts:

> When Congress entrusts to an equity court the enforcement of prohibitions contained in a regulatory enactment, it must be taken to have acted cognizant of the historic power of equity to provide complete relief in light of the statutory purposes. As this Court long ago recognized, 'there is inherent in the Courts of Equity a jurisdiction to . . . give effect to the policy of the legislature'. 361 U.S. at 291-92 (citations omitted)

Justice Harlan then concluded that "because of what we have found to be the statuory purposes there is doubtless little room for the exercise of discretion not to order reimbursement," 361 U.S. at 296.[103] That case is espe-

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[102] The Company discharged several employees because they filed complaints with the Secretary of Labor. This discharge violated 29 U.S.C. §215(a)(3). See *Mitchell* v. *Robert De Mario Jewelry, Inc.*, 260 F.2d 929, 930 (5th Cir. 1958).

[103] See *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 397-99 (1946) (this opinion is relied on by the Court in *Mitchell* v. *Robert de Mario Jewelry, Inc.*, *supra*).

The Supreme Court has similarly directed that the discretion of the federal courts in enforcing the Securities Exchange Act of 1934, 15 U.S.C. §§77b *et seq.* should be exercised towards providing full and complete relief from violations and towards effectuating the public policy of the Act. *J.I. Case Co.* v. *Borak*, 377 U.S. 426, 433-34 (1964).

cially compelling here, since the pertinent FLSA provision did not even specifically authorize back pay,[104] as Section 706(g) of Title VII does.

In addition to insuring that the district courts properly implement the Congressional purpose expressed in Title VII, the standard established by the Fourth Circuit implements another essential function: to insure that the decisions of the district courts within the circuit are consistent. If the Court of Appeals did not establish a general guide for the district courts to follow in exercising their discretion then cases arising within the same jurisdiction on all but identical facts could lead to opposite results, as they did before the enunciation of standards by the Fourth, Fifth and Sixth Circuits. Judge Craven properly phrased this problem:

> The question then is whether, in light of the broad aims of Title VII, this Court may affirm the opposite result as to back pay on similar factual situations because such award rests in the discretion of the district judge. 474 F.2d at 141 (A. 522)

The standards established by the Fourth, Fifth and Sixth Circuits serve to eliminate fundamentally inconsistent applications of Title VII.[105] The standards of the Fourth,

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[104] 29 U.S.C. §217, §17 of the Fair Labor Standards Act of 1938, provides only for prohibitory injunctive relief.

[105] A dramatic example of such a fundamental inconsistency of judicial application is demonstrated by comparing the district courts' opinions in the instant case and in *Robinson* v. *Lorillard Corp., supra, aff'g* 319 F.Supp. 835 (M.D. N.C. 1970). These two cases presented startlingly similar issues of fact and law. In both cases a principal issue was the departmental seniority system which perpetuated the discriminatory effects of the past segregated job assignments. Both cases also presented closely analogous defenses of "good faith" and "waiver" by plaintiffs. In this case the district court accepted those defenses, whereas the dis-

Fifth, and Sixth Circuits quite properly direct district courts to implement Title VII consistently with the purpose and policy Congress intended. The standards do not, in any sense, remove all discretion from the district courts. The district courts retain discretion to avoid unjust results,[106] to fashion remedies which effectively terminate discriminatory practices and their effects,[107] and to select the most efficient and equitable remedies.[108]

As an example of proper discretion, Judge Craven indicated that an award of back pay in cases involving female protective law statutes would be unjust, 474 F.2d at 142 (A. 524).[109] The Courts of Appeals have held that these statutes are invalid under Title VII but have denied both

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trict court in *Robinson* awarded back pay after specifically rejecting the two defenses.

Similar inconsistent decisions were rendered by district courts in the Fifth and Sixth Circuits before those Circuits established standards guiding the exercise of discretion. Compare *Bush* v. *Lone Star Steel Corporation*, 373 F.Supp. 526, 536-37 (E.D. Tex. 1973), with *Johnson* v. *Goodyear Tire & Rubber Company*, 349 F.Supp. 3 (S.D.Tex. 1972), *rev'd* 491 F.2d 1364 (5th Cir. 1974); compare *United States* v. *Bricklayers, Local No. 1*, 5 EPD ¶8480 (W.D. Tenn. 1973), *aff'd sub nom United States* v. *Masonry Contractors Ass'n of Memphis, Inc.*, 497 F.2d 871 (6th Cir. 1974), with *Head* v. *Timken Roller Bearing Company*, 6 EPD ¶8679 (S.D. Ohio 1972), *rev'd* 486 F.2d 870 (6th Cir. 1973).

[106] See, e.g., 474 F.2d at 142, A. 523-4.

[107] *Louisiana* v. *United States*, 380 U.S. 145, 154 (1965); *Green* v. *School Board of New Kent County*, 391 U.S. 430, 439 (1968); *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 15, 21 (1971).

[108] See pp. 55-56, *infra*.

[109] The factual patterns in all these cases are similar. Prior to the application of Title VII many states had female protective laws which limited the employment conditions of women, such as the hours that women might work. Consequently, an employer's adherence to these mandatory statutes resulted in reduced employment opportunity and wages for women.

injunctive relief and back pay.[110] The rationale for the denial of all relief—apart from a declaration that the protective law is invalid—is the established principle that state statutes are entitled to the presumption of validity until there has been a judicial declaration to the contrary. See e.g., *Davies Warehouse Co.* v. *Bowles,* 321 U.S. 144, 153 (1944).[111] The Fourth Circuit has also recognized that district courts under the *Moody* standard would have discretion to deny back pay in other circumstances in order to avoid an unjust result. See e.g., *Lea* v. *Cone Mills Corp.,* 301 F.Supp. 97, 102 (M.D.N.C. 1969), *aff'd in pertinent part* 438 F.2d 86 (4th Cir. 1971); *Roberts* v. *Hermitage Cotton Mills, Inc.,* 8 EPD ¶9589 (D.S.C. 1973), *aff'd* 498 F.2d 1397 (4th Cir. 1974).

Moreover, the district courts have the discretion, and this is the heart of equitable discretion, to formulate relief that will both effectively remedy violations of Title VII and apply fairly to the pertinent employment system.[112] District courts properly exercise their discretion when they seek to insure both an effective remedy and an equitable

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[110] *Kober* v. *Westinghouse Electric Corporation,* 480 F.2d 240 (3rd Cir. 1973); *Le Blanc* v. *Southern Bell Telephone and Telegraph Co.,* 460 F.2d 1228 (5th Cir. 1972), *cert. denied* 409 U.S. 990 (1972); *Manning* v. *General Motors Corp.,* 466 F.2d 812 (6th Cir. 1972), *cert. denied* 409 U.S. 1086 (1973); *Rosenfeld* v. *Southern Pacific Company,* 444 F.2d 1219 (9th Cir. 1971); but see *Schaeffer* v. *San Diego Yellow Cabs, Inc.,* 462 F.2d 1002 (9th Cir. 1972).

[111] Clearly, "good faith" reliance on a state protective law statute is fundamentally different from the assertions of "good faith" made by the defendants. Therefore, it is inapposite for the defendants to rely on *Kober* v. *Westinghouse Electric Corporation, supra,* a typical female protective law case. Co. Br. at 54 n.56, 61 n.67; U. Br. at 19, 31. See n.126, *infra.*

[112] See *Int'l Ass'n of Heat, Frost & Asbestos Workers Local 53* v. *Vogler,* 407 F.2d 1047, 1052-53 (5th Cir. 1969); *Vogler* v. *McCarty, Inc.,* 451 F.2d 1236, 1238 (5th Cir. 1971); *United States* v. *Ironworkers Local 86,* 443 F.2d 544, 553 (9th Cir. 1971) *cert. denied* 404 U.S. 984 (1971).

result for all the concerned employees and parties. Accordingly, courts may in some situations apply prospective compensatory relief rather than injunctive relief,[113] or compensatory training programs,[114] or particular rather than general revisions in the seniority system.[115] Lastly, district courts have broad discretion to determine appropriate methods for the calculation of earnings lost as a result of discrimination,[116] and to allocate back pay liability among the defendants.[117]

The Fourth Circuit's standard which properly guides the district courts toward fair results does not, as defendants contend, conflict with the decision in *Curtis* v. *Loether*, 415 U.S. 189 (1974), (Co. Br. at 26, 53; U. Br. at 19, 23, 25). The issue in *Curtis* was whether the Seventh Amendment required a jury trial for an award of monetary relief pursuant to §812 of the Civil Rights Act of 1968, 42 U.S.C. §3612. The Court distinguished lower court decisions that a jury trial was not required by the back pay remedy of Title VII by stating, *inter alia*, that "the deci-

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[113] See e.g., Note, *Title VII, Seniority Discrimination and the Incumbent Negro*, 80 HARV. L. REV. 1260, 1281-2 (1967); *United States* v. *United States Steel Corporation*, 371 F. Supp. 1045, 1060 (N.D. Ala. 1973).

[114] See e.g., *Buckner* v. *Goodyear Tire & Rubber Company*, 339 F. Supp. 1108, 1124-5 (N.D. Ala. 1972), *aff'd per curiam* 476 F.2d 1287 (5th Cir. 1973); *National Organization of Woman* v. *Bank of California*, 6 EPD ¶8867 (N.D. Cal. 1973), p. 5675.

[115] See e.g., *Meadows* v. *Ford Motor Company, supra*, 9 EPD at pp. 6771-72.

[116] Back pay only includes "actual" losses in pay, 474 F.2d at 142, A. 524. For a thorough discussion of the methods available to the district court, in its discretion, for the calculation of back pay, see *Pettway* v. *American Cast Iron Pipe Company, supra*, 494 F.2d at 259-64.

[117] See e.g., *Johnson* v. *Goodyear Tire & Rubber Company, supra*, 491 F.2d at 1382.

sion whether to award back pay is committed to the discretion of the trial judge", 415 U.S. at 197. This is fully consistent with the decision below since the district courts still maintain discretion under the *Moody* standard, *see* pp. 55-56, *supra*. In fact *Curtis*, by referring to prior decisions[118] which specifically direct the federal courts to exercise their discretion to fashion relief designed to implement Congressional policy, lends direct assistance to the argument in support of the *Moody* standard.

Finally, Albermarle and the Union criticize the Fourth Circuit's standard for determining whether a back pay award is appropriate on a practical ground: that the standard will provide an obstacle to conciliation and settlement.[119] This argument is contrary to common sense and experience. If no standard guides the district court, then the lack of predictability in the law would be an inducement to litigate. Parties would be unable to predict whether the district court would award back pay; as a practical matter, the decision as to back pay liability could well turn on which district court judge finally determined the question.

The experience in Title VII litigation since 1973, when the Courts of Appeals established clear standards for the exercise of discretion, indicates that the voluntary resolution of employment discrimination suits has been advanced. Governmental agencies and private litigants have concluded many consent decrees in Title VII actions which have provided wide-ranging relief, including back pay.[120]

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[118] *Mitchell* v. *Robert De Mario Jewelry, Inc., supra; Porter* v. *Warner Holding Co., supra;* these decisions are discussed on pp. 52-53, *supra*.

[119] Co. Br. at 60-61; U. Br. at 32-33.

[120] See e.g., *United States* v. *Philadelphia Electric Company*, C.A. No. 72-1483 (E.D. Pa. Sept. 21, 1973) (Consent Decree); *United States* v. *Eastex, Inc.*, C.A. No. B-73-CA-81 (E.D. Tex. Feb. 18,

Rather than obstructing the elimination of employment discrimination, a clear judicial standard governing the award of back pay will serve the national purpose of ending employment discrimination by causing employers and unions to carefully evaluate, and to change, where discriminatory, their employment practices without first being subjected to administrative or judicial proceedings.[121]

> They [back pay awards] provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, as far as possible, the last vestiges of an unfortunate and ignominious page in this country's history.

United States v. *N.L. Industries, Inc., supra,* 479 F.2d at 379.[122]

1974) (Consent Decree); *United States* v. *East Texas Motor Freight System,* C.A. No. 3-6025-B (N.D. Tex., Feb. 19, 1974) (Consent Decree); *EEOC* v. *Bank of America, Inc.,* C.A. No. C-71409CB-R (N.D. Cal. June 24, 1974) (Consent Decree); *EEOC* v. *Continental Trailways,* C.A. No. SA72-CA197 (W.D. Texas, March 19, 1973) (Consent Decree); *EEOC* v. *Preston Trucking Co.,* C.A. No. 72-632-M (D. Md. June 25, 1973) (Consent Decree); *EEOC* v. *Container Corporation of America,* C.A. No. 72-336-Civ.-J-T (M.D. Fla. Nov. 4, 1974) (Consent Decree).

Mack v. *General Electric Co.,* C.A. No. 69-2653 (E.D. Pa. 1973) (Consent Decree); *Patterson* v. *N.M.D.U.,* C.A. No. 73-Civ.-3058 (S.D.N.Y. October 25, 1974) (Consent Decree); *Branch* v. *Reynolds Metals,* C.A. No. 170-72-R (E.D. Va. 1974) (Consent Decree); *Burks* v. *Babcock & Wilcox Company,* C.A. No. 71-C-59L (E.D. Va. 1974) (Consent Decree); *Suggs* v. *Container Corporation of America,* C.A. No. 7058-72-P (S.D. Ala. April 1, 1974) (Consent Decree).

[121] We note, in this connection, the district court's speculation (A. 498)—seized upon by Albemarle—that defendants might have sought an earlier adjudication and termination of their unlawful practices, had they known that back pay liability was accruing.

[122] See also *Sprogis* v. *United Air Lines, supra,* 444 F.2d at 1201; *Culpepper* v. *Reynolds Metals Co.,* 421 F.2d 888, 891 (5th

This Court has emphasized that back pay awards under the National Labor Relations Act are designed to give effect to the public policy of the Act as well as to compensate those who suffered from unlawful employment practices. *NLRB* v. *Rutter-Rex Manufacturing Co., supra,* 396 U.S. at 263; *Nathanson* v. *NLRB, supra,* 344 U.S. at 27. Since Title VII of course effectuates a national policy as strong as that of the National Labor Relations Act, back pay is appropriate not only to compensate individuals but also to ensure compliance with statutory prohibitions.

In conclusion, the standard developed in *Newman* v. *Piggie Park Enterprises,* 390 U.S. 400 (1968), to direct the exercise of discretion of district courts in awarding attorneys' fees under Title II of the Civil Rights Act of 1964, 42 U.S.C. §2000a-3(b), states a proper standard[123] to guide the exercise of discretion of district courts in awarding back pay under Title VII. The rationale is similar in both instances. The availability of back pay, like that of attorneys' fees, will further compliance with the law. The provision of attorneys' fees encourages members of the bar to represent aggrieved persons; back pay encourages employers and unions to scrutinize their practices, and encourages victims of discrimination to seek redress. Both remedies shift the financial burden of correcting discrimination from victim to violator.

The standard announced below directs district courts to exercise their discretion in furtherance of the purpose and

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Cir. 1970); see *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964,* 84 HARV. L. REV. 1109, 1163 (1971).

[123] "It follows that one who succeeds in obtaining an injunction under that title should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." 390 U.S. at 402.

policy of Title VII, but does not improperly restrict district courts from exercising their discretion.

C. Back Pay Is a Proper Remedy in This Case.

Defendants fully eliminated none of their discriminatory employment practices until entry of the district court's injunction in November, 1971, see pp. 8-12, *supra*. As a result of those practices, black employees suffered severe losses of income, see n. 17, *supra*. Yet the district court, after concluding that it had plenary discretion under §706(g), left the burden of these losses on the black workers. The court gave three reasons for its ruling: (1) the absence of bad faith non-compliance with Title VII by defendants, including certain steps taken by Albemarle to alleviate the severity of its discriminatory practices; (2) factors indicating that Albemarle might be less a culpable or more beneficent employer than others in its locality; and (3) the alleged lateness of plaintiffs' specification of the back pay claim and the possibility that defendants might have been prejudiced thereby (A. 498). The Court of Appeals rejected these reasons as legally inadequate to justify denying back pay (A. 520-522).[124]

Both precedent and policy support the award of back pay in this case. This Court's reminder in *Griggs* v. *Duke Power Co., supra*, 401 U.S. at 432, that

> good intent or absence of discriminatory intent does not redeem employment procedures or testing mecha-

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[124] Although the Court, because of its holding, had no occasion to review the finding of "good faith," the record casts substantial doubt on whether any such finding could be sustained. See pp. 3-12, *supra*. Moreover, the district court's finding was based in part on its erroneous view that Albemarle's testing program was job-related.

> nisms that operate as "built-in headwinds" for minority groups and are unrelated to measuring job capability

applies to remedies as well as to finding liability. For this reason the appellate courts have uniformly and correctly rejected "good faith"—or the absence of "bad faith"—as a defense for Title VII violators.[125] Good faith cannot relieve a discriminatory employer of liability under Title VII because Congress provided back pay as a remedy for economic injury, not for bad motives:

> . . . it is argued that back pay should not be awarded in the absence of specific intent to discriminate. A corollary argument is that the award was improper in light of the unsettled state of the law. The principal answer to both points is that back pay is not a penalty imposed as a sanction for moral turpitude; it is compensation for the tangible economic loss resulting from an unlawful employment practice. Under Title VII the plaintiff class is entitled to compensation for that loss, however benevolent the motives for its imposition. *Robinson* v. *Lorillard Corp., supra,* 444 F. 2d at 804.

Kober v. *Westinghouse Electric Corp.*, 480 F.2d 240 (3rd Cir. 1973), on which both defendants rely, is merely one in a line of cases involving state female protective statutes. See pp. 54-55, *supra*. Its reasoning is squarely based on the

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[125] Fourth Circuit: *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 802, 804; Fifth Circuit: *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1376-1377; *Pettway* v. *American Cast Iron Pipe Co., supra,* 494 F.2d at 253; *Baxter* v. *Savannah Sugar Refining Corp., supra,* 495 F.2d at 442-3; Sixth Circuit: *Head* v. *Timken Roller Bearing Co., supra,* 486 F.2d at 877; Seventh Circuit: *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra,* 502 F.2d at 1321; Eighth Circuit: *United States* v. *N. L. Industries, Inc., supra,* 479 F.2d at 379. The holding of these cases is in accord with settled principles in labor law and related fields. See cases cited in *Johnson* v. *Goodyear Tire & Rubber Co., supra,* 491 F.2d at 1377 n.37.

"special circumstances" presented in such cases, see 480 F.2d at 246-8; it does not endorse the good faith defense in any broader context.[126]

"Good faith" or absence of "bad faith" are unworkable standards for back pay awards. Such standards would inevitably involve the courts in adjudication of subjective states of mind of employers and labor unions. Meaningful standards of definitive proof as to good or bad faith would be difficult if not impossible to articulate and apply. In practice, acceptance of such a test would assure the district courts an effectively unreviewable discretion to implement—or to ignore—the statutory purpose.

The factors cited by the district court (A. 498) illustrate the anomalous results that the "good faith" standard invites. The court found some support in the fact that paper mill jobs on the whole may require a higher skill level than tobacco industry jobs; yet this circumstance cannot excuse the imposition of non-job-related criteria like Albemarle's educational requirement and testing program, and is totally irrelevant to the unlawful job-seniority system. The court further noted that Albemarle paid

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[126] See, *e.g.*, *Manning* v. *International Union*, 466 F.2d 812 (6th Cir. 1972), distinguished in *Head* v. *Timken Roller Bearing Co.*, *supra*, 486 F.2d at 877 n.10; *LeBlanc* v. *Southern Bell Telephone & Telegraph Co.*, *supra*, distingished in *Johnson* v. *Goodyear Tire & Rubber Co.*, *supra*, 491 F.2d at 1377 ("Such an argument [as Albemarle's] falls of its own weight").

Norman v. *Missouri-Pacific Railroad Co.*, *supra*, does not support the good faith defense for which Albemarle cites it (Br. at 56). The Eighth Circuit in *Norman* expressed grave doubts as to the viability of that defense, see 497 F.2d at 596-7. Nor will Albemarle's citation *(id.)* of *United States* v. *N. L. Industries*, *supra*, and *United States* v. *St. Louis-San Francisco Railway Co.*, 464 F.2d 301 (8th Cir. *en banc* 1972), *cert. denied* 409 U.S. 1107 (1973), withstand scrutiny. Neither case as interpreted in *Norman*, *supra*, relied primarily on good faith or absence of bad faith as its reason for denying back pay.

higher wages than other local employers;[127] but this cannot justify the fact that white paper mill workers earned substantially more than black paper mill workers because of race. Although Albemarle purportedly began trying to recruit black mechanics in 1964, it had made virtually no progress by mid-1967, two years after Title VII and one year after filing of this suit (see pp. 8-9, *supra*). And while the court applauded defendants' "voluntary" 1968 changes in the seniority system and LOP configuration, those changes left many unnecessary obstacles to black advancement and had little practical effect (see pp. 9-11, *supra*).

The district court also found an exculpatory circumstance in plaintiffs' failure to claim back pay from the outset of this case (A. 498). Its conclusion was apparently based on a theory of waiver or laches. Albemarle now seeks to bar black workers from back pay because, at an early stage of the litigation, a brief filed on their behalf had stated that back pay would be sought only for individuals before the court. Yet later, when it had become clear that class-wide back pay was being upheld by the courts, plaintiffs asserted such a claim—well over a year before the start of the trial. See p. 13, *supra*. The presence of the class back pay issue in the case was thereafter repeatedly stated and reaffirmed in a series of pre-trial orders of the district court.[128] Moreover, plaintiffs were ordered to answer supplementary interrogatories concerning the basis for and amount of back pay claimed on behalf of each class member (A. 46) and did so answer (A. 116-7); and individual members of the class

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[127] The Company's evidence focussed on municipal civil servants, farm labor, hospital workers, and school teachers, Co. Ex. 11, 12, 15, 17. See Co. Br. 13.

[128] See Order of September 28, 1970 (A. 38), Order of May 28, 1971 (A. 46), and Order of July 8, 1971 (A. 51).

were obliged by court order to file proofs of claim (A. 55-56, 70-85).

Rule 54(c), F. R. Civ. P., directs that "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." This directive, the plaintiffs' demand for judgment of back pay over one year before trial, and its own pre-trial orders contemplating back pay relief notwithstanding, the district court denied all back pay—with respect to both the named plaintiffs and the other class members—stating that

> the defendants would be substantially prejudiced by the granting of such affirmative relief. The defendants *might* have chosen to exercise unusual zeal in having this court determine their rights at an earlier date had they known that back pay would be at issue (A. 498) (emphasis supplied).

This was *not* a finding of fact on the part of the district court (*cf.* Co. Br. at 59 n.61) but merely part of one of its conclusions of law. By its own terms it was based on sheer conjecture and is unsupported by the record.[129] "Unusual zeal" for an early determination of their rights has never characterized the tactics of the defendants in any stage of this litigation—before or after they had learned of the back pay claim.

As shown above, back pay is a major remedy provided by Congress to effectuate the purposes of Title VII as well as to give financial relief to the victims of discrimination. Such important public rights ought not lightly to be deemed to have been waived. This Court has repeatedly held that

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[129] It appears to have been an afterthought, since in any event it could have had no relevance to the back pay claims of the named plaintiffs which the court also denied.

a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.[130] Rule 54(c) reflects the movement of the law away from formality and ritual and towards the rendition of justice. It has been, and should be, construed to prevent parties from forfeiting their claims because of a harmless misstep early in the litigation. See 10 Wright & Miller, *Federal Practice and Procedure* §§2662, 2664 (1973), especially pp. 117-8 and cases there cited; 6 Moore's *Federal Practice* (2d ed. 1974) ¶54.62. The attachment of draconian consequences to the wording of the 1966 memorandum submitted by the class representative was especially inequitable in light of the court's obligation to protect the interests of class members.[131] To treat plaintiffs' 1966 statement as a waiver would only serve to undermine the strong Congressional policy against discriminatory employment practices, cf. *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 51-52.

Albemarle asserts that "the long delay in adding the back pay claims satisfies all of the elements of laches. . . ." (Co. Br. at 58). This is transparently incorrect. Laches may not be invoked merely upon a showing of delay; the delay must amount to improper lack of diligence with resulting prejudice to the opposing party. See *Costello* v. *United States,* 365 U.S. 265, 282 (1961); *Gardner* v. *Panama Railroad Co.,* 342 U.S. 29, 30-31 (1951):

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[130] See *Brooklyn Savings Bank* v. *O'Neil,* 324 U.S. 697, 704 (1944); *Schulte* v. *Gangi,* 328 U.S. 108 (1946):

> Where a private right is granted in the public interest to effectuate legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate. 324 U.S. at 704-705.

[131] *Cf.* Rule 23(e), F.R.Civ.P.; *Eisen* v. *Carlisle & Jacquelin,* 417 U.S. 156, 175-177 (1974).

> The equities of the parties must be considered as well. Where there has been no inexcusable delay in seeking a remedy and where no prejudice to the defendant has ensued from the mere passage of time, there should be no bar to relief. (citations omitted)

No such "inexcusable delay" and no such prejudice is shown here.

The question of the treatment of belated claims for back pay has arisen in at least three circuits. They have uniformly held that because of the importance of back pay, such claims must be entertained. See *Rosen* v. *Public Service Electric & Gas Co., supra,* 409 F.2d at 780, n.20; *Robinson* v. *Lorillard Corp., supra,* 444 F.2d at 802-03; *United States* v. *Hayes International Corp.,* 456 F.2d 112, 116, 121 (5th Cir. 1972); see also *Sprogis* v. *United Air Lines, Inc., supra,* 444 F.2d at 1202. These cases apply *a fortiori* to the instant case. In each of them, the claim for back pay was asserted after the conclusion of trial--not, as here, over a year before the trial was started. See also *NLRB* v. *Rutter-Rex Manufacturing Co.,* 396 U.S. 258 (1959).[132] In every one of these cases, the defendants could have interposed the same conjecture raised by defendants here that the late back pay claim was somehow prejudicial to them. The short answer as held in *Robinson, supra,* is

> In our case, because the obligation to provide back pay stems from the same source as the obligation to reform the seniority system, any general defenses relevant to the back pay award were equally relevant to

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[132] In *Rutter-Rex,* this Court reversed the Court of Appeals' modification of the NLRB's back pay calculation which was based on the "inordinate" delay (five years) of the Board in determining back pay, and ordered the Board's back pay award reinstated in full.

> the suit for injunctive relief. Any specific defenses related only to computation of back pay may be raised during the process of assessing individual back pay claims, possibly before a special master. The defendants have in no way been prejudiced by the belated claim. 444 F.2d at 803.[133]

In his dissenting opinion, Judge Boreman suggested two additional grounds for supporting the denial of back pay by the district court. These were: the sale of assets of the original employer company by one parent corporation to another, and the possibility that the delay might have impeded defendants' pre-trial preparation (474 F.2d at 146 n.16; A. 531 n.16). These reasons were mere speculation since there was no indication in the district court's opinion that it had found either factor significant. Neither ground is persuasive. The rights of victims of employment discrimination should not be sacrificed in the crossfire of intercorporate controversies.[134] Nor will the record support the conjecture as to the difficulty of preparing defenses to individual back pay claims. In any event, the order of the Court of Appeals would necessitate a new and separate hearing on individual back pay claims. Defendants will have the opportunity—and the burden—to mount

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[133] Indeed in *Rental Development Corp. of America* v. *Lavery*, 304 F.2d 839, 842 (9th Cir. 1962), the very case relied upon by Albemarle to demonstrate that Rule 54(c) would not be applied if "the failure to ask for particular relief substantially prejudiced the opposing party" (Co. Br. at 59), the holding of the case was that the issues were similar and that there was no prejudice.

[134] The sale of corporate assets of the original Albemarle Company from Ethyl Corp. to Hoerner-Waldorf Corp. raises merely the question of which of the various companies involved in the "corporate re-shuffle" (A. 35) should bear which part of the burden—not whether the losses are recoverable. Indeed, Ethyl Corp. filed a cross-claim (later voluntarily withdrawn) against Hoerner-Waldorf Corp. (A. 41) demanding that the latter defend the action for it and hold it harmless.

their defenses to the back pay claims of particular class members at that stage.[135]

In terms of the Fourth Circuit's standard, there are no special circumstances in this case which would render an award of back pay unjust.[136] And under any standard this Court could articulate consistent with the Congressional history and purpose, the record will not support denial of compensation to the plaintiff class.

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[135] A separate proceeding to compute back pay claims following the trial of the issue of liability is routinely ordered in Title VII cases. See, *e.g.*, *Robinson* v. *Lorillard Corp.*, *supra*, 444 F.2d at 803 n.17; *Baxter* v. *Savannah Sugar Refining Corp.*, *supra*, 495 F.2d at 443-4; *Pettway* v. *American Cast Iron Pipe Co.*, *supra*, 494 F.2d at 258-60.

[136] Both defendants seek affirmance of the district court's exercise of discretion on the additional "special circumstances" ground that the district court probably had other unstated reasons for its ruling (Co. Br. at 59-60; U. Br. at 29 n.32). This hypothesis serves to highlight the need for an appellate standard and the appropriateness of the Fourth Circuit's formulation. To allow district courts, in the name of "discretion" or as a "special circumstance," to deny back pay relief on the basis of unarticulated reasons or retrospective rationalizations would ill serve the Congressional purpose that such relief should be available as appropriate.

CONCLUSION

The judgment of the Court of Appeals for the Fourth Circuit should be affirmed, and the case remanded to the district court for proceedings consistent with the opinion of the Court of Appeals.

Respectfully submitted,

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